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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1734

HARRY KUBO, NISEI FARMERS LEAGUE and WESTERN TOMATO GROWERS & SHIPPERS, INC.,
Appellants,

vs.

AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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Appellee.

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Appellants appeal from the judgment of the Supreme Court of California, entered on March 4, 1976, directing that a peremptory writ of mandate issue compelling the Superior Courts of Tulare and Fresno Counties, California to vacate various orders and judgments enjoining the enforcement of an administrative regulation which permits access to private agricultural property by union organizers. Appellants

submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Supreme Court of California is reported in 16 Cal.3d 392. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought under California Code of Civil Procedure §§526, 1060, and 1085 (1975) to enjoin the enforcement of, and to declare as invalid and unconstitutional, an access regulation adopted by the California Agricultural Labor Relations Board (hereinafter the "ALRB" or "Board").

The judgment of the Supreme Court of California was entered on March 4, 1976, and Appellants' notice of appeal was filed in that court on March 8, 1976. See Appendix B, attached hereto.

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2), and the following cases sustain that jurisdiction: *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934); *Live Oak Water Users' Association v. Railroad Commission of State of California,* 269 U.S. 354 (1926).

THE STATUTE INVOLVED

California Administrative Code, Title 8, Part II, Chapter 9, §§20900-20901, pp. 1051-1053. See Appendix C, attached hereto.

QUESTIONS PRESENTED

1. Whether a state regulation which allows non-employee union organizers the right of access to the private property of each and every agricultural employer in the State of California is unconstitutional for overbreadth or for otherwise being in violation of the Fifth and Fourteenth Amendments due process clauses.

2. Whether the constitutional tests of "balancing" and "accommodation" as explained in *NLRB v. Babcock & Wilcox,*[1] *Central Hardware v. NLRB,*[2] and *Hudgens v. NLRB,*[3] govern the validity of a state regulation allowing non-employee access to private property; or, as held by the lower court, whether the "rational relationship" test is the applicable judicial standard of review.

3. Whether the access regulation is a deprivation of fundamental personal liberties in violation of the Fifth and Fourteenth Amendments of the Constitution; or, as held by the lower court, whether the access regulation is "but a limited economic regula-

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[1] 351 U.S. 105 (1956).
[2] 407 U.S. 539 (1972).
[3] ..... U.S. ....., 47 L.Ed.2d 196 (1976).

tion of the use of real property imposed for the general public welfare."[4]

4. Whether the enumerated Constitutional limitations of *Central Hardware* which, *inter alia,* limit access to non-working areas and the duration of organizational activity, are applicable to an access regulation adopted by the State of California.

STATEMENT OF THE CASE

This appeal involves the validity of a state regulation which allows non-employee union organizers the right of access to the private property of each and every agricultural employer in the State of California. This regulation, as conceded by Appellee and as recognized by the lower court, allows such non-employee access despite the fact that unions have available alternative effective means of communication, and despite the fact that access is neither limited to non-working areas nor to the duration of organizational campaigns.

The access regulation was adopted by Appellee ALRB on August 29, 1975. It was adopted immediately following a public hearing which lasted but one day. In adopting the regulation, the ALRB was acting purportedly pursuant to its authority under the California Agricultural Labor Relations Act (hereinafter "ALRA"), a comprehensive agricultural labor relations statute which became effective on August 28, 1975 and which was modeled after the National Labor

[4] 16 Cal.3d at 409.

Relations Act (hereinafter "NLRA"). (See California Labor Code §1140 et seq.)

A. The Proceedings in the Trial Court

On September 8, 1975, Appellants, agricultural employers subject to the provisions of the ALRA and the instant access regulation, filed suit in the Fresno County Superior Court seeking a writ of mandate and injunctive and declaratory judgment relief against enforcement of the access regulation. On September 10, 1975, after oral argument and submission of memoranda, affidavits and exhibits by all parties, the Superior Court granted Appellants the relief requested by adjudging, *inter alia,* that the access regulation by reason of its overbreadth and failure to comport with prior controlling U. S. Supreme Court decisions was an unconstitutional infringement of Appellants' fundamental property rights.

An action similar to that of Appellants was filed on September 3, 1975 by other agricultural employers, Pandol & Sons and Jasmine Vineyards, Inc., before the United States District Court for the Eastern District of California. The Court issued a temporary restraining order that same day against the enforcement of the rule on the ground that it was an unconstitutional infringement of the employers' fundamental property rights. A three-judge Federal District Court was later convened which continued in effect for an additional five days the TRO, but ultimately decided that federal abstention was appropriate. Pandol & Sons and Jasmine Vineyards later sought and obtained a temporary restraining order

from the Tulare County Superior Court which found, *inter alia,* that the access regulation was an unconstitutional infringement of the property rights of said agricultural employers.

B. The Decision Below

The ALRB thereafter petitioned the Supreme Court of California for an immediate stay of the lower court decisions and a writ of prohibition and/or mandate to compel the Superior Courts of Tulare and Fresno Counties to vacate their previously issued judgments and orders enjoining the enforcement of the access regulation. On September 18, 1975, the California Supreme Court granted the requested stay pending final determination of the proceedings before that Court. On March 4, 1976, over a vigorous dissent by Justice Clark and by a 4-3 majority vote, the California Supreme Court concluded that the access regulation was valid in that, *inter alia,* it did not violate the Fifth and Fourteenth Amendments of the United States Constitution. In so holding, the Court professed to apply the standards of *Babcock & Wilcox,* but did not. Instead, the Court concluded that non-employee access as to individual employers would be permissible even though unions had available alternative effective means of communication, and even though access would neither be limited to non-working areas nor to the duration of organizational campaigns. The Court held that the property rights affected by the access regulation were not "fundamental personal liberties" (16 Cal.3d at 409) and that the access regulation "satisfies the due process clause if it has a

reasonable relation to a proper public purpose and is neither arbitrary nor discriminatory." 16 Cal.3d at 410. Hence, the lower court viewed the access regulation as a mere "limited economic regulation of the use of real property" and thus ignored the correct constitutional test for adjusting conflicts between organizational rights and fundamental property rights: "[*a*]*ccommodation* between the two must be obtained with as *little* destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co., supra,* 351 U.S. at 112.

C. Stage at Which Federal Questions Were Raised

The Federal questions in this case were raised in the original complaint for a temporary restraining order, writ of mandate, and declaratory judgment filed with the Superior Court of Fresno County. In its Findings of Fact and Conclusions of Law, and Declaratory Judgment, the Superior Court specifically adjudged that the access regulation unconstitutionally infringed upon Appellants' property rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. Copies of the Superior Court's Findings of Fact and Conclusions of Law, and Declaratory Judgment, are attached hereto as Appendix D.

Appellee ALRB's petition to the California Supreme Court for a writ of mandate and/or prohibition contended, among other things, that the access regulation was constitutionally permissible and did not infringe upon any fundamental personal liberties or rights. Appellants responded to the alternative

writ of mandate issued by the California Supreme Court by filing a Return and a Memorandum in support thereof, in which all Federal constitutional questions raised herein were fully articulated and briefed. In addition, these Federal questions were raised and submitted to the California Supreme Court during oral argument. In its written opinion the lower court expressly stated, "[t]he real parties in interest contend that the access regulation is unconstitutional because it assertedly deprives them of property rights without due process of law and constitutes a taking of those rights without just compensation." 16 Cal.3d at 403. The lower court concluded that the regulation "transgresses no constitutional command." 16 Cal.3d at 411.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case involves the application of the wrong Constitutional standards and the failure to follow applicable decisions of this Court. Substantial questions are raised which this Court should hear because the lower court's decision results not only in the improper infringement of property rights of a countless number of California agricultural employers but, if allowed to stand, the lower court's decision will enable every state to enact statutes or regulations infringing on the private property rights of every employer in the country not subject to the National Labor Relations Act to a degree more substantial

than this Court has ever allowed the NLRB to do under the Federal labor laws.[5]

It obviously does not make sense for stricter standards to be imposed on the NLRB than on the states when the same fundamental Constitutional rights are involved, i.e., Fifth and Fourteenth Amendment fundamental property rights.[6]

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[5]This is not mere idle speculation. As of this date Arizona, Kansas, Idaho, Oregon and Michigan have enacted statutes affecting labor relations matters between agricultural employers and employees. See, e.g., Ariz.Rev.Stats. §23-1381, et seq.; Kans. Stats. Ann. §44-818, et seq. (1972); Idaho Code §22-4101, et seq.; Ore.Rev.Stats. §662.805, et seq. In addition, we are informed that within the past two years, such bills have been introduced into the legislatures of Texas, New Mexico, Utah, Hawaii, and Washington. We are further informed by the Florida Legislative Service Office that the Florida legislature has such a bill that is in the process of being drafted and shall soon be introduced for legislative consideration. Cf. *New York v. O'Neill*, 359 U.S. 1, 3 (1959).

[6]Appellants do not contend that the State of California may not experiment or attempt novel approaches in dealing with its farm labor matters. However, Appellants do contend, as this Court has noted many times, that when so experimenting, the State may not abridge fundamental rights. As Justice Goldberg stated in *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (concurring), "Elsewhere I have stated that '[w]hile I quite agree with Mr. Justice Brandeis that . . . a . . . state may serve as a laboratory; and try novel social and economic experiments (citations omitted), I do not believe that this includes the power to experiment with the fundamental liberties of citizens.'"

ARGUMENT

THE LOWER COURT'S DECISION VARIES FROM THIS COURT'S PRIOR DECISIONS UNDER THE NLRA IN TWO SIGNIFICANT RESPECTS.

A. Contrary to this Court's Decisions, the ALRB's Rule Allows Access to Private Property in a Countless Number of Cases Where It Is Not Necessary and Would Not Be Permitted Had The Case Originated Under the Federal Labor Laws.

The day after the ALRA became law the ALRB held a one day hearing and the following day announced the access rule now in question. In so doing the Board found that "[*g*]*enerally*, alternative channels of effective communication [are not available]." (Emphasis added). For appellants and thousands of other agricultural employers,[7] however, alternative effective means of communication are available and yet they are required, under the lower court's decision, to allow union organizers on their property during working time. This clearly does not comport with the due process of law requirements of the Fifth and Fourteenth Amendments.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), *Central Hardware Co. v. NLRB*, 407 U.S.

[7]According to the U.S. Bureau of Census, *U.S. Census of Agriculture: 1964* and *1969*, Vol. II, of which the Court is respectfully requested to take judicial notice, in 1969 there were approximately 78,000 farms in the State of California; the value of the products sold by these farms (i.e., a value of approximately 4 billion dollars) was greater than that of any other state in the country. See, U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 614 (1975 96th Annual Edition).

539 (1972), and *Hudgens v. NLRB*, ... U.S. ....., 147 L.Ed.2d 196 (1976), this Court established that when employees' statutory organizational rights conflict or compete with an employer's Fifth or Fourteenth Amendment property rights, the appropriate constitutional test is one of balancing or accommodation. Thus, this Court stated in *Babcock & Wilcox* that "accommodation" between organizational rights of workers and property rights of the employer "must be obtained with *as little destruction* of one as is consistent with the maintenance of the other." (351 U.S. at 112.) It is important to note that in the *Babcock & Wilcox* case the Court had before it three separate NLRB decisions in which the Board had "found in each case that it was *unreasonably difficult* for the union organizer to reach the employees off company property and held that, in refusing the unions access to parking lots, the employers had unreasonably impeded the employees' rights to self-organization . . . ." 351 U.S. at 106. (Emphasis added). Notwithstanding the Board's findings and the Court's observations that the Board's orders were "reasonable regulations" (*Id.* at 112), the Court concluded that there were other available means of communication for the unions and therefore it was not *necessary* for the employers' property rights to be infringed.

In contrast, the court below admitted "that there will be individual instances in which access might in fact [be] unnecessary in order to effectively communicate with the workers." 16 Cal.3d at 410. Notwith-

standing this admission, the court below upheld the access rule because it "is not a deprivation of 'fundamental personal liberties' but a limited economic regulation of the use of real property imposed for the public welfare," citing a zoning case from this Court, and further held that "such a regulation satisfies the due process clause if it has a reasonable relation to a proper public purpose." 16 Cal.3d 409-410.

As the dissenting opinion by California Supreme Court Justice Clark makes clear, "[The California Supreme] Court is apparently the only court unable to grasp that the appropriate standard for review is one of balancing and not of rational relationship." (16 Cal.3d at 430.)

It is also noteworthy that in *Babcock & Wilcox* and its progeny there is neither citation nor reference to cases which involve zoning regulations or cases applying the reasonable relationship test. The reason, of course, is that an employer's property rights are fundamental personal liberties that are protected by the due process clause and thus are entitled to a judicial scrutiny more significant and substantial than a mere reasonable relationship test. See, *Lloyd Corp. v. Tanner,* 407 U.S. 551, 570 (1972); *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972); see also, *Cleveland Board of Ed. v. LaFleur,* 414 U.S. 632, 644, 649 (1974); *Vlandis v. Kline,* 412 U.S. 441, 446 (1973). At the very least, and as explained in *Babcock,* these fundamental rights are entitled to a balancing test which allows intrusions on private property *only* "to the extent *needed* to permit communication." 351 U.S. at 112[8]. By failing to apply this balancing test to the instant access regulation, the California Supreme Court clearly ignored the express mandate of this Court, and accordingly, the lower court's decision is in obvious conflict with the prior controlling decisions of this Court. *NLRB v. Babcock & Wilcox Co., supra; Central Hardware Co. v. NLRB, supra; Hudgens v. NLRB, supra.*[9]

B. In Those Cases Where Access Is Necessary, The Degree of Access Permitted by the ALRB Is Constitutionally Overbroad.

The second substantial area of difference between the lower court decision and the previous decisions of this Court is in the area of the application of the rule. Of the various cases arising out of the National Labor Relations Act, not a single case allows access

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[8]Significantly, a balancing test which allows intrusion only to the extent "needed" or "necessary" is similar to the type of judicial review accorded whenever fundamental constitutional rights are abridged by governmental action. See, *Cleveland Board of Ed. v. LaFleur, supra; Vlandis v. Kline, supra; Stanley v. Illinois,* 405 U.S. 645, 657 (1972). The use of such a balancing test by this Court in *Babcock* clearly indicated that the Court viewed the employer's property rights as important and fundamental civil liberties.

[9]At issue here is *not,* as the lower court apparently believed, the appropriateness of case by case adjudication vis-a-vis rulemaking in the area of non-employee access. Certainly a regulation can be devised which sets forth understandable criteria and which takes into account the constitutional standards and limitations of *Babcock & Wilcox* and its progeny. Such a regulation would likely be constitutional in that it would treat each individual employer's property with the constitutional deference to which it is guaranteed by the due process clause. The instant access regulation, however, because it treats all employers alike and allows non-employee access even where alternate means of communication exist, is patently overbroad and thus violates the Fifth and Fourteenth Amendments, due process clauses.

to the work areas during working time. As the Court stated in *Central Hardware:*

> "The allowed intrusion on property rights is *limited to that necessary* to facilitate the exercise of an employee's Section 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; (iii) the duration of the organizational activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." 407 U.S. at 544-545. (Emphasis added).

In contrast to the explicit limitations specified above in *Central Hardware,* the ALRB's rule allows access by union organizers during work time in work areas.[10] There is absolutely no justification in the lower court's decision for this substantial interference with the rights of agricultural employers.

[10]Under the access rule if there is not a regularly scheduled one hour lunch break, organizers can enter the fields for an hour during any period of the work day and attempt to organize employees while they are working. A regularly scheduled one hour lunch break is the exception rather than the rule in California agriculture.

CONCLUSION

For the reasons set forth above, the decision below conflicts with controlling decisions of this Court, and should be summarily reversed on the authority of those cases. Moreover, the questions presented are important and of substantial consequence not only to the thousands of agricultural employers of California affected by this overbroad regulation, but also to the tens of thousands of employers throughout this country who are not subject to the Federal labor laws and who could be affected by similar statutes and regulations in their respective states. Accordingly, if the Court is not disposed to reverse summarily, it is respectfully urged that probable jurisdiction be noted and that the questions presented be set down for full briefing and argument.

Dated: May 27, 1976.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

S. F. No. 23,349

In the Supreme Court
of the
State of California

In Bank

Agricultural Labor Relations Board et al.,
Petitioners,

vs.

The Superior Court of Tulare County et al.,
Respondents;

Pandol & Sons et al.,
Real Parties in Interest.

[Filed March 4, 1976]

Opinion

The state Agricultural Labor Relations Board (ALRB) petitions for an original writ of mandate to compel respondent Superior Courts of Tulare and Fresno Counties to vacate various orders enjoining enforcement of an administrative regulation which permits qualified access to agricultural property by farm labor organizers. We have concluded that the

regulation is valid and the board is entitled to the relief requested.

On August 28, 1975, the Agricultural Labor Relations Act (ALRA) (Lab. Code, § 1140 et seq.) went into effect. The preamble to the act recites in part that "In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations. [¶] This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state." (Stats. 1975, Third Ex. Sess., ch. 1, § 1, No. 3 West's Cal. Legis. Service, p. 304, No. 2 Deering's Adv. Legis. Service, p. 1147.)

To achieve this goal, the act declares the right of agricultural employees to organize themselves into unions and to engage in collective bargaining, free from intimidation by either employers or union representatives. Thus new section 1140.2 of the Labor Code states "the policy of the State of California" to be "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part

[i.e., the ALRA] is adopted to provide for collective-bargaining rights for agricultural employees."[1]

Remaining provisions of the act implement this legislative intent in two principal ways. First, chapter 4 characterizes a variety of acts by employers or unions as unfair labor practices. In particular, it is declared to be an unfair labor practice for employers to interfere in any way with the goal of self-organization by farm workers, to favor any union over another, to discriminate against any worker for asserting his rights under the statute, or to refuse to bargain in good faith with the certified representative union. (Lab. Code, § 1153.)[2]

Secondly, chapter 5 sets forth elaborate provisions for elections by secret ballot to determine the representative union for collective bargaining purposes. "Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees" (§ 1156.4), the act authorizes such elections only during peak harvest seasons. An election will be held when a union obtains the signatures of the majority of the workers on a ranch; if a second union obtains the signatures of 20 percent of the same work force, it will also be

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[1]Section 1152 reaffirms that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." The quoted language is identical to that of section 7 of the National Labor Relations Act (NLRA). (Now 29 U.S.C. § 157.)

[2]The provisions of section 1153 are closely modeled on those of section 8 of the NLRA. (Now 29 U.S.C. § 158.)

placed on the ballot. The ballots are printed in English, Spanish, and any other language requested. Once authorized, an election is quickly held: within 48 hours in a case of a strike, and within 7 days in other cases. Within five days thereafter any person may challenge the propriety of the election or its results. (§ 1156.3.)

Article 1 of chapter 2 creates the ALRB and prescribes its method of operation. Article 2 vests the board with broad investigatory powers, and makes it a criminal offense to interfere in the performance of the board's duties. Numerous provisions throughout the remainder of the act grant the board specific powers and responsibilities of administration, particularly in conducting and certifying elections and in investigating and preventing unfair labor practices. On the latter subject chapter 6 begins by declaring (§ 1160) that "The board is empowered . . . to prevent any person from engaging in any unfair labor practice" defined in the act, and succeeding sections authorize the board to use a variety of methods to achieve that end: administrative complaint (§ 1160.2), cease and desist order (§ 1160.3), temporary restraining order (§ 1160.4), injunctive relief (§ 1160.6), and enforcement orders from both the superior courts and the Courts of Appeal (§ 1160.8).

In addition to its adjudicatory and executive powers, the board is vested with express legislative authority: section 1144 delegates to the board the power to make, amend, and repeal "such rules and regulations as may be necessary to carry out the provisions" of the ALRA.

The board promptly adopted emergency regulations for the operation of the act. (Cal. Admin. Code, tit. 8, pt. II, § 20100 et seq.) Among those provisions is the regulation here in issue, which grants a qualified right of access to growers' premises by farm labor organizers. (Cal. Admin. Code, tit. 8, pt. II, ch. 9, §§ 20900-20901, pp. 1051-1053.)[3] Under the terms of the regulation the right of access is specifically limited in purpose, in time and place, and in the number of organizers permitted to participate; and conduct is forbidden, other than speech, which is "disruptive of the employer's property or agricultural operations, including injury to crops or machinery."[4]

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[3]The regulation took effect on August 29, 1975. An emergency regulation automatically expires 120 days after its effective date unless the agency certifies during that period that it has complied with certain requirements of notice and hearing. (Gov. Code, § 11422.1.) The ALRB so certified on December 2, 1975, and the regulation will therefore remain in effect until such time as it may be amended or repealed.

[4]The relevant portions of the regulation read as follows:

"5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 [fn. 1, *ante*] to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:

"a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

"b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

"c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30

Two groups of growers, real parties in interest herein, filed actions in the Fresno and Tulare Superior Courts attacking the validity of the regulation and seeking to prevent its enforcement. The Fresno Superior Court held a hearing on the matter and on the same day issued a peremptory writ of mandate ordering the board to vacate the regulation, together with a declaratory judgment that the regulation is invalid on both constitutional and statutory grounds. At the same time the Tulare Superior Court issued a temporary restraining order prohibiting the board from enforcing the regulation, and set a hearing on an order to show cause why an injunction to that effect should not be issued. Upon application and appropriate showing by the board, we stayed the effect of the respective superior court rulings pending final determination of this proceeding for writ of mandate.

I

The remedy is proper. The challenged rulings of respondent courts are primarily injunctive in effect. The codes, embodying a settled principle of equity ju-

workers in a crew, there may be one additional organizer for every 15 additional workers.

"d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

"e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

"f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this act have been certified."

risprudence, prohibit the granting of injunctive relief "To prevent the execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, 2d subd. 4; Civ. Code, § 3423, subd. Fourth.) That rule is here applicable, inasmuch as a regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute. *(Zumwalt v. Trustees of Cal. State Colleges* (1973) 33 Cal.App.3d 665, 675 [109 Cal.Rptr. 344]; *Alta-Dena Dairy v. County of San Diego* (1969) 271 Cal.App.2d 66, 75 [76 Cal.Rptr. 510]; *Rigley v. Board of Retirement* (1968) 260 Cal.App.2d 445, 450 [67 Cal.Rptr. 185], and cases cited.) It is true the rule prohibiting such an injunction does not operate when the statute which is stayed is unconstitutional or otherwise invalid. *(Conover v. Hall* (1974) 11 Cal.3d 842, 850 [114 Cal.Rptr. 642, 523 P.2d 682].) As will appear, however, we have concluded that the access regulation is valid. Under the codes, therefore, respondent courts had no jurisdiction except to deny the real parties' request to enjoin enforcement of the regulation. *(City of Los Angeles v. Superior Court* (1959) 51 Cal.2d 423, 430 [333 P.2d 745], and cases cited.)

When a court's discretion can legally be exercised in only one way, mandate will lie to compel that exercise if there is no adequate remedy at law. *(Babb v. Superior Court* (1971) 3 Cal.3d 841, 851 [92 Cal. Rptr. 179, 479 P.2d 379].) The absence of an adequate remedy at law was determined herein when we issued the alternative writ. *(Ibid.)* Accordingly, man-

date is an appropriate remedy to compel respondent courts to vacate their orders invalidating and enjoining enforcement of the access regulation. *(People v. Superior Court* (1967) 248 Cal.App.2d 276, 282 [56 Cal.Rptr. 393].) And we exercise our original jurisdiction to grant that remedy (Cal. Const. art. VI, § 10) because we find that in the circumstances of this case " 'the issues presented are of great public importance and must be resolved promptly.' " *(Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808 [114 Cal.Rptr. 577, 523 P.2d 617], quoting from *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845 [59 Cal.Rptr. 609, 428 P.2d 593].)

II

We begin with the constitutional issues. The real parties in interest contend that the access regulation is unconstitutional because it assertedly deprives them of property rights without due process of law and constitutes a taking of those rights without just compensation. (Cal. Const., art. I, §§ 1, 7, subd. (a), and 19; U.S. Const., 5th and 14th Amends.) As will appear, however, the constitutional challenge comes many years too late.

The real parties principally rely on *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219], and *Diamond v. Bland* (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460], but the decisions are not in point. In each a divided court held that the constitutional guarantee of free speech was not violated by the refusal of a shopping center to permit its

property to be used for distribution of antiwar handbills (*Lloyd*) or solicitation of signatures on an initiative petition (*Diamond*). The matter at bar, by contrast, is not primarily a First Amendment case. At issue here is not an exercise of freedom of speech on a topic of general concern in a convenient public forum; rather, the interest asserted is the right of workers employed on the premises in question to have effective access to information assisting them to organize into representative units pursuant to a specific governmental policy of encouraging collective bargaining. The inapplicability of the *Lloyd-Diamond* rule to labor disputes is noted on the face of each opinion *(Lloyd,* at pp. 560-561 [33 L.Ed.2d at pp. 137-138]; *Diamond,* at p. 334, fn. 3), and has been elsewhere emphasized by both the United States Supreme Court *(Central Hardware Co. v. NLRB* (1972) 407 U.S. 539, 545 [33 L.Ed.2d 122, 127-128, 92 S.Ct. 2238]) and this court *(United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 911 [122 Cal.Rptr. 877, 537 P.2d 1237]).

The governmental policy in favor of collective bargaining, as the above-quoted preamble to the ALRA makes clear, is designed to benefit the public as a whole. It should scarcely be necessary, as we enter the last quarter of the 20th century, to reaffirm the principle that all private property is held subject to the power of the government to regulate its use for the public welfare. We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years

ago it was already "'thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare. . . . [I]ncidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare are not considered a taking of the property for which compensation must be made.'" *(Miller v. Board of Public Works* (1925) 195 Cal. 477, 488 [234 P. 381, 38 A.L.R. 1479], quoting from *Carter v. Harper* (1923) 182 Wis. 148, 153 [196 N.W. 451, 33 A.L.R. 269].) This is living law today. *(HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 515 [125 Cal.Rptr. 365, 542 P.2d 237].) And no different rights are conferred by the corresponding provisions of the federal Constitution. (See, e.g., *Nebbia v. New York* (1934) 291 U.S. 502, 523-527 [78 L.Ed. 940, 948-951, 54 S.Ct. 505, 89 A.L.R. 1469].)

Nor should we need to recall the corollary of the foregoing principle, to wit, that governmental power is not static but dynamic: it is not "confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public," but rather is "capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race." *(Miller v. Board of Public Works, supra,* at pp. 484, 485.) Early restraints on the unfettered use of private property—e.g., the doctrines of easement and nuisance—were few in number and narrow in scope. But modern social legislation has added many others—e.g., building codes, zoning restrictions, land use planning, and urban redevelopment—which are far more pervasive in their effect on the rights of property owners. Thus, an eminent authority on the law of property lists no less than 20 ways in which private property is today subject to governmental regulation (Powell, *The Relationship Between Property Rights and Civil Rights* (1963) 15 Hastings L.J. 135, 148-149), and concludes that "the history of the law of private ownership has witnessed simultaneously a playing-down of absolute rights and a playing-up of social concern as to the use of property. . . . Property rights have been redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects

the health, the safety, the morals, or the welfare of others." (*Id.*, at pp. 149-150.)

The efforts for social justice documented in that history have precipitated many conflicts. In most the reasonable needs of the community as a whole have eventually prevailed. But in the general retreat of recalcitrant forces, a strange rearguard action has been fought by those property owners who are also employers of labor: "Though subject to reasonable use in other areas of the law, curiously the concept a property rights has become a rallying cry in the field of labor law. The traditional notion would seem to be that the concept suffices as an absolute defense against those who would engage in union activity. That notion—like so many others held as doctrine by past generations—may well be under increasing attack." (Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property* (1965) 49 Minn. L.Rev. 505, 509.)

The issue joined here is new to the California courts, but our federal brethren have often considered it in the industrial labor context.[5] "In *Republic Aviation Corp. v. Board* [(1945) 324 U.S. 793 (89 L.Ed. 1372, 65 S.Ct. 982, 157 A.L.R. 1081)], the Supreme Court set forth the ground rules concerning union activity on company property." (Gould, *The Question of Union Activity on Company Property* (1964) 18 Vand.L.Rev. 73, 75.) The case dealt with organizational activities conducted on the employer's premises by union spokesmen who were also employees of the company. The high court ratified the position of the NLRB that absent extraordinary circumstances it is an unfair labor practice for the employer to prohibit such activities during nonworking hours. The court quoted with approval the following language of the decision of the board: "'As the Circuit Court of Appeals for the Second Circuit has held, "It is not every interference with property rights that is within the Fifth Amendment . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." [*National Labor R. Board v. Cities Service Oil Co.* (2d Cir. 1941) 122 F.2d 149, 152.] The Board has frequently applied this principle in decisions involving varying sets of circumstances, where it has held that the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, . . .'" (*Id.*, at p. 802, fn. 8 [89 L.Ed. at p. 1379].)[6]

[5]In other settings our courts have looked to federal decisions interpreting provisions of the NLRA similar to state law. (E.g., *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 687-689 [8 Cal.Rptr. 1, 355 P.2d 905]; *Petri Cleaners, Inc. v. Automotive Employees, etc Local No. 88* (1960) 53 Cal.2d 455, 459-460 [2 Cal.Rptr. 470, 349 P.2d 76]; *International Assn. of Fire Fighters v. County of Merced* (1962) 204 Cal.App.2d 387, 392 [22 Cal.Rptr. 270].

[6]The reasoning in support of this conclusion was given in the court's quotation from an earlier NLRB decision in point (*Peyton Packing Company* (1943) 49 NLRB 828, 843-844), which said in part that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting

The second landmark case on this topic is *Labor Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105 [100 L.Ed. 975, 76 S.Ct. 679]. In contrast to *Republic Aviation,* the union organizers excluded from the employers' premises in the three consolidated cases decided in *Babcock & Wilcox* were not employees of the companies in question. The NLRB found that in the circumstances shown it was unreasonably difficult for the organizers to make contact with the employees off company property, and concluded that in denying the organizers permission to distribute union literature on company parking lots the employers had unlawfully interfered with the right of the employees to self-organization under the NLRA. The Supreme Court ruled that the board erred in failing to draw a distinction between employee and nonemployee organizers: access to company property by the latter can be denied, said the court, "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message. . . ." *(Id.* at p. 112 [100 L.Ed. at p. 982].)[7]

By declaring the foregoing standard the court necessarily rejected any claim that "property rights" of

union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." (324 U.S. at pp. 803-804, fn. 10 [89 L.Ed. at p. 1380].)

[7]A second condition imposed by the court—i.e., prohibiting discrimination against the union "by allowing other distribution"—is not involved in the case at bar.

The court concluded that on the record of each of the three cases before it the evidence did not support the board's finding of employee inaccessibility, and therefore declined to decree enforcement.

employers are paramount to their employees' right to have effective access to information assisting them in their goal of self-organization: "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *(Id.* at p. 113 [100 L.Ed. at p. 983].) Rather, employers' property rights must give way whenever the two interests are found to be in irreconcilable conflict: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. . . . But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *(Id.* at p. 112 [100 L.Ed. at pp. 982-983].) (Accord, *Central Hardware Co. v. NLRB* (1972) *supra,* 407 U.S. 539, 542-545 [33 L.Ed.2d 122, 125-128].)

Examples of the application of this rule appear in a variety of contexts. In *Republic Aviation* the court in dictum distinguished the case before it from those involving "a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped." (Fn. omitted.) (324 U.S. at p. 799 [89 L.Ed. at p. 1377]; see also *Labor Board v.*

Stowe Spinning Co. (1949) 336 U.S. 226, 232, fn. 10 [93 L.Ed. 638, 644, 69 S.Ct. 541].)

Shortly thereafter such a case arose. In *National Labor Rel. Bd. v. Lake Superior Lumber Corp.* (6th Cir. 1948) 167 F.2d 147, the employer operated a number of lumbering camps on its timber tract. Each was isolated from any town, and was largely self-sufficient. The employees lived on the camp premises in bunkhouses; although given Sundays off, they usually remained in the camps. In these circumstances the NLRB ruled it was an unfair labor practice for the employer to bar nonemployee union organizers from entering the bunkhouses to talk with the men during nonworking hours. Enforcing the order of access, the Sixth Circuit Court of Appeals relied on the above-quoted dictum in *Republic Aviation* and held that "In view of the limited free time available to the employees and the practical difficulties involved in contacting them after the evening meal in any place other than in the bunkhouses, union organization would as a practical matter be seriously handicapped by restricting such activity to the recreation hall." (*Id.*, at p. 152.) (Accord, *Alaska Barite Company* (1972) 197 N.L.R.B. 1023 (mining camp on private island).)

Nor is the right of access limited to remote lumber or mining camps; it may attach in the case of a ship anchored in a busy port. Thus in *National Labor R. Board v. Cities Service Oil Co.* (2d Cir. 1941) *supra*, 122 F.2d 149, the employer operated ocean-going oil tankers which entered United States ports to discharge their cargo. A maritime union was refused passes to board the ships while in port for the purpose of negotiating grievances of the seamen. The NLRB ruled this practice violated the seamen's rights to self-organization and collective bargaining under section 7 of the NLRA. The Second Circuit Court of Appeals agreed, reasoning that "The result of refusing passes is undoubtedly to prevent the most effective sort of collective action by the employees. Ships, and particularly these oil tankers, which ordinarily remain in port for a day only, afford less opportunity for investigation of labor conditions than do factories where the employees go home every afternoon and have the evenings at their disposal. There is no cessation of work at the end of each day for seamen on a tanker. A large number of them are on watch, others are loading or discharging cargo; their hours for work and shore leave are different and, in the short time the vessel is in port, it is impossible for Union representatives to assemble the unlicensed personnel either on shore or on shipboard to discuss grievances or investigate conditions. The Union must have the members of the crew readily accessible in order to work to any real advantage. . . ." (*Id.* at p. 151.) The court therefore granted enforcement of the board's order of access. (Accord, *Richfield Oil Corp. v. National Labor Relations Board* (9th Cir. 1944) 143 F.2d 860; *Sabine Towing & Transportation Co.* (1973) 205 N.L.R.B. No. 45; see also *National Labor Rel. Bd. v. National Organization, etc.* (7th Cir. 1958) 253 F.2d 66, 70.)

The same result has been reached on a showing of significantly less employee isolation than in the fore-

going cases. In *N.L.R.B. v. S. & H. Grossinger's Inc.* (2d Cir. 1967) 372 F.2d 26, the employer operated a large rural resort hotel located only one and one-half miles from the nearest town. Sixty percent of the employees lived on the premises, but the remainder lived in neighboring towns and drove to work by car or taxi. The employer refused access to its premises by nonemployee union representatives, and the NLRB ruled this to be interference with the employees' right of self-organization. The federal circuit court observed that "No effective alternatives are available to the Union in its organizational efforts. The resident employees have no telephones in their rooms. Radio and newspaper advertising are expensive and relatively ineffectual. Moreover as far as radio is concerned, there was no single time at which a major proportion of employees would be off duty and free to listen to a message broadcast by the Union. . . . [¶] While some organization work can be done by employees who are willing to solicit fellow employees, it is obvious that lacking as they do the requisite special training and experience, they cannot convey the Union's appeal with anything like the effectiveness of professional union organizers." *(Id.* at p. 29.)[8]

The court then quoted and applied the principles of *Babcock & Wilcox* as follows: "Here the majority of the employees live on the employer's premises. They

[8]The court added that the union's attempts to reach the employees as they drove through the gates to the resort were ineffective because the cars did not stop there except briefly for a traffic light, and in any event it was difficult or impossible to distinguish between guests and employees in such circumstances.

cannot be reached by any means practically available to union organizers. As against these considerations Grossinger's raises only its proprietary interest. It shows no detriment that would result from the admission to its property of the Union's representatives under those reasonable regulations as to place, time and number which the Board's order contemplates.

"We will enforce the Board's order in so far as it requires [the employer] to permit nonemployee union organizers to come on its premises in order to solicit employees." *(Id.* at p. 30.) (Accord, *H. & G. Operating Corp. (Raleigh Hotel)* (1971) 191 N.L.R.B. No. 110; see also *Fafnir Bearing Company v. N.L.R.B.* (2d Cir. 1966) 362 F.2d 716, 722 (company ordered to allow union to enter premises to conduct independent time studies).)[9]

Thus the rule of *Babcock & Wilcox,* both as enunciated and as applied, is clear: if the circumstances of employment "place the employees beyond the reach of reasonable union efforts to communicate with them, *the employer must allow the union to approach his employees on his property.*" (Italics added.) (351 U.S. at p. 113 [100 L.Ed. at p. 983].) This language could not be plainer. We deem it dispositive of the issue of

[9]We recognize that other federal circuit court decisions have refused to enforce NLRB orders of access. (See e.g., *N. L. R. B. v. Sioux City and New Orleans Barge Lines, Inc.* (8th Cir. 1973) 472 F.2d 753; *N. L. R. B. v. New Pines, Inc.* (2d Cir. 1972) 468 F.2d 427; *N. L. R. B. v. Tamiment, Inc.* (3d Cir. 1971) 451 F.2d 794; *N. L. R. B. v. Kutsher's Hotel and Country Club, Inc.* (2d Cir. 1970) 427 F.2d 200.) But in each case the court found that on the record presented either the union had not made a reasonable effort to communicate with the employees or the alternative means of doing so were effective.

the federal constitutionality of access to agricultural property under the challenged regulation of the ALRB (cf. *Petersen v. Talisman Sugar Corporation* (5th Cir. 1973) 478 F.2d 73, 79), and of the claim of invalidity premised on the cited provisions of the California Constitution. (Art. I, §§ 1, 7, subd. (a), and 19.) In the present context we construe those sections to guarantee no greater rights to California property owners than do their federal counterparts.

The only remaining question in this regard is whether it is *constitutionally* required that the determination of employee inaccessibility within the meaning of the *Babcock & Wilcox* test be made on a case-by-case basis, as the real parties urge, rather than by a rule of general application. As will appear, there is no authority for imposing such a requirement as a matter of constitutional law.

The question was not presented in either *Babcock & Wilcox* or *Central Hardware,* and the opinions are therefore silent on the point. The real parties rely on decisions holding that when a statute or regulation impairs a fundamental personal liberty, the state has the burden of showing that the measure is necessary to promote a compelling governmental interest (see, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 638 [22 L.Ed.2d 600, 617, 89 S.Ct. 1322]; *Castro v. State of California* (1970) 2 Cal.3d 223, 234-236 [85 Cal. Rptr. 20, 466 P.2d 244]) and that there are no reasonable alternative means of accomplishing that goal (*Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 640-644 [39 L.Ed.2d 52, 60-63, 94 S.Ct. 791];

Shelton v. Tucker (1960) 364 U.S. 479, 488 [5 L.Ed. 2d 231, 237, 81 S.Ct. 247]). That well-known principle, however, is not applicable here: for the reasons stated at the outset, the access rule is not a deprivation of "fundamental personal liberties" but a limited economic regulation of the use of real property imposed for the public welfare. (Cf. *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 7-8 [39 L.Ed.2d 797, 803-804, 94 S.Ct. 1536].)

It has long been settled that such a regulation satisfies the due process clause if it has a reasonable relation to a proper public purpose and is neither arbitrary nor discriminatory. (*Nebbia v. New York* (1934) *supra,* 291 U.S. 502, 537 [78 L.Ed. 940, 957, 54 S.Ct. 505, 89 A.L.R. 1469]; accord, *Weinberger v. Salfi* (1975) 422 U.S. 749, 768-770 [45 L.Ed.2d 522, 540-542, 95 S.Ct.—], and cases cited.) In the light of *Babcock & Wilcox,* it cannot be said that an access regulation designed to assist self-organization by workers lacks a reasonable relation to a valid public goal; and a careful examination of the various limitations as to time, place, purpose, and manner which are written into this regulation (fn. 4, *ante*) demonstrates that it is neither arbitrary nor discriminatory within the meaning of the foregoing standards.

The principal objection of the real parties to the board's decision to proceed by way of rule rather than adjudication is that there will be individual instances in which access might in fact have been unnecessary in order to effectively communicate with the workers. This is inevitable, as the board candidly

recognizes. But it does not follow therefrom that the regulation is unconstitutional. "In the area of economics and social welfare, the State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' [Citation.] 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogically, it may be, and unscientific.'" (*Dandridge v. Williams* (1970) 397 U.S. 471, 485 [25 L.Ed.2d 491, 501-502, 90 S.Ct. 1153].) Moreover, "a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment." (*Richardson v. Belcher* (1971) 404 U.S. 78, 81 [30 L.Ed.2d 231, 235, 92 S.Ct. 254].)

It follows, as we have often had occasion to hold, that general economic regulations affecting property rights are not constitutionally invalid merely because they may be inappropriate in the case of a few individual property owners. (See, e.g., *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-645 [94 Cal.Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847].) The entire law of zoning, from *City of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 388-389 [71 L.Ed. 303, 310-311, 47 S.Ct. 114, 54 A.L.R. 1016], to the present day, stands as witness to that fact of contemporary life. And it is a fundamental tenet of such law that if a zoning plan is reasonable vis-a-vis the community as a whole, it is not rendered unconstitutional merely because certain property owners can show that it causes them unnecessary hardship. (*Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 787 [31 Cal.Rptr. 335, 282 P.2d 375]; *McCarthy v. City of Manhattan Beach* (1953) 41 Cal. 2d 879, 890 [264 P.2d 932]; *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338 [175 P.2d 542]; *Zahn v. Board of Public Works* (1925) 195 Cal. 497, 512 [234 P. 388].)

We conclude that the decision of the ALRB to regulate the question of access by a rule of general application transgresses no constitutional command.

III

An administrative regulation, however, must also comport with various statutory prerequisites to validity. At the outset we take note of certain principles which govern our consideration of the matter; although these rules have been often restated, it would be well to remember that they are not merely empty rhetoric. First, our task is to inquire into the legality of the challenged regulation, not its wisdom. (*Morris v. Williams* (1967) 67 Cal.2d 733, 737 [63 Cal.Rptr. 689, 433 P.2d 697].) Second, in reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" (Gov. Code, § 11373) and (2) is "reasonably necessary to effectuate

the purpose of the statute" (Gov. Code, § 11374).[10] Moreover, "these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations." (*Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 175 [70 Cal.Rptr. 407, 444 P.2d 79].) And in considering whether the regulation is "reasonably necessary" under the foregoing standards, the court will defer to the agency's expertise and will not "superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 832 [27 Cal.Rptr. 19, 377 P.2d 83].)

The real parties in interest seek to overcome the presumption of regularity on several grounds. First, it is contended that in two respects the access regulation exceeds the authority of the board because it conflicts with the ALRA. The claim is not that the regulation contravenes any particular provision of the act expressly forbidding qualified access to agricultural property by union organizers—or declaring such entry to be an unfair labor practice—for no such provision exists. Rather, it is urged that the regulation violates the Legislature's *implied* intent to prohibit such access, assertedly manifested by both legislative action and inaction. Neither branch of the contention is convincing.

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[10]A third inquiry—whether the regulation was adopted pursuant to proper procedure—is not an issue in this case.

As noted earlier, article 1 of chapter 2 of the act prescribes the composition and general method of operation of the board; among its provisions is section 1148, which declares in its entirety that "The board shall follow applicable precedents of the National Labor Relations Act, as amended." The real parties stress the fact that it is the practice of the NLRB to decide questions of employee inaccessibility on a case-by-case basis rather than by general rule; when the ALRB adopted a contrary procedure, argue the real parties, it therefore violated section 1148.

The unstated major premise of this argument, however, is that in enacting section 1148 the Legislature impliedly intended the board to follow not only the substantive case law (i.e., the "precedents") interpreting the NLRA—holding, for example, that certain activities do or do not constitute unfair labor practices—but also the rules of procedure of the NLRB. In our view the premise appears highly dubious. More importantly, the board could reasonably construe section 1148 otherwise, and that is our only concern. "In determining whether a specific administrative rule falls within the coverage of the delegated power, the sole function of this court is to decide whether the department reasonably interpreted the legislative mandate." (*Ralphs Grocery Co. v. Reimel, supra,* at p. 176 of 69 Cal. 2d.)

Adverting first to the language of section 1148, we note that it directs the board to follow the "precedents" of the "Act," not the "procedure" of the "Board." The ALRB could reasonably have concluded

that the choice of words was significant, and hence that the Legislature did not intend it to be bound by any particular rule of practice adopted by the federal agency to suit its own needs. This conclusion could well have been reinforced by the fact that the state act vests the board with full rulemaking authority in an earlier and different provision (§ 1144) which makes no reference to the practices of the NLRB. In addition, we observe that section 1148 directs the board to be guided by the "applicable" precedents of the NLRA, not merely "the precedents" thereof. From this language the board could fairly have inferred that the Legislature intended it to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California agricultural scene. As we shall see, a case-by-case resolution of the question of access appears inappropriate in that context.

More importantly, in the absence of an express statutory directive to the contrary the board could also reasonably presume that the Legislature intended to abide by the well-settled principle of administrative law that in discharging its delegated responsibilities the choice between proceeding by general rule or by ad hoc adjudication "lies primarily in the informed discretion of the administrative agency." (*Securities Comm'n v. Chenery Corp.* (1947) 332 U.S. 194, 203 [91 L.Ed. 1995, 2002, 67 S.Ct. 1575]; accord, *PBW Stock Exchange, Inc. v. Securities and Exch. Com'n* (3d Cir. 1973) 485 F.2d 718, 732; *GTE Service Corporation v. F. C. C.* (2d Cir. 1973) 474 F.2d 724, 731;

Alabama-Tennessee Natural Gas Co. v. Federal Power Com'n (5th Cir. 1966) 359 F.2d 318, 343 (Wisdom, J.); see generally Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy* (1965) 78 Harv.L.Rev. 921; Baker, *Policy by Rule or Ad Hoc Approach—Which Should it Be?* (1957) 22 Law & Contemp. Prob. 658.)[11] The real parties in interest fail to show that the ALRB abused its discretionary powers as a duly constituted administrative agency when it determined to proceed on this issue by way of a general rule rather than ad hoc adjudication.

A related argument is premised not only on section 1148 but also on section 1152 of the ALRA, emphasizing that the language of the latter which declares the right of farmworkers to organize and to bargain collectively is identical to that of section 7 of the NLRA. (See fn. 1, *ante*.) Reliance is then placed on the rule that "When legislation has been judicially construed and a subsequent statute on the same or an

[11]This principle applies equally well to the NLRB. (See, e.g., *NLRB v. Bell Aerospace Co.* (1974) 416 U.S. 267, 294 [40 L.Ed. 2d 134, 153-154, 94 S.Ct. 1757].) That agency, however, has chosen to proceed on a case-by-case basis not only on questions of employee inaccessibility, but on essentially all issues within its competence. We note that the pervasive and long-standing reluctance of the NLRB to promulgate any rules or regulations whatever has been the subject of "substantial and repeated scholarly and judicial criticism. . . ." (*Retail, Wholesale and Department Store U. v. N. L. R. B.* (D.C. Cir. 1972) 466 F.2d 380, 388; see *NLRB v. Wyman-Gordon Co.* (1969) 394 U.S. 759 [22 L.Ed.2d 709, 89 S.Ct. 1426]; Davis Administrative Law Treatise (1970 Supp.) § 6.17; Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act* (1970) 79 Yale L.J. 571; Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board* (1961) 70 Yale L.J. 729.)

analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes." (*Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) *supra,* 54 Cal.2d 684, 688-689.) From this premise it is reasoned that the Legislature must have intended that the board also follow the NLRB practice of ad hoc adjudication of the access issue.

We do not question the quoted rule of statutory construction, but in the circumstances of the case at bar it does not lead to the claimed conclusion. It may be posited that by adopting the language of section 7 of the NLRA the Legislature intended also to adopt the rule of *Babcock & Wilcox* and *Central Hardware* applying that language to the right of nonemployee labor organizers to enter an employer's premises for union purposes. But as we observed above, the question whether such a right of access should be resolved by regulation or by adjudication was not presented in either decision, and the opinions are accordingly silent on the matter. The teaching of *Babcock & Wilcox* and its progeny, rather, is simply that qualified access to an employer's premises must be granted when the circumstances of employment render ineffective the reasonable efforts of union representatives to communicate with the employees by alternative methods. (351 U.S. at p. 112 [100 L.Ed. at pp. 982-983].)

Far from ignoring this lesson, the ALRB predicated its access regulation on factual findings phrased in the very language of *Babcock & Wilcox*. Those findings disclose that the board did not adopt the NLRB practice on the access question because it determined that significant differences existed between the working conditions of industry in general and those of California agriculture. As we have seen, in regulating industrial labor disputes the NLRB has authorized access by union organizers to employers' premises when, for example, the same employees did not arrive and depart every day on fixed schedules, there were no adjacent public areas where the employees congregated or through which they regularly passed, and the employees could not effectively be reached at permanent addresses or telephone numbers in the nearby community, or by media advertising.

By contrast, the ALRB found that such conditions are the rule rather than the exception in California agriculture. The evidence heard by the board showed that many farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in. Obviously home visits, mailings, or telephone calls are impossible in such circumstances. According to the record, even those farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical because it is both time-consuming and expensive.

Nor is pamphleting or personal contact on public property adjacent to the employer's premises a reasonable alternative in the present context, on several grounds. To begin with, many ranches have no such public areas at all: the witnesses explained that the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower. Secondly, the typical industrial scene of a steady stream of workers walking through the factory gates to and from the company parking lot or nearby public transportation rarely if ever occurs in a rural setting. Instead, the evidence showed that labor contractors frequently transport farmworkers by private bus from camp to field or from ranch to ranch, driving directly onto the premises before unloading; in such circumstances, pamphleting or personal contact is again impossible. Thirdly, the testimony established that a significant number of farmworkers read and understand only Spanish, Filipino, or other languages from India or the Middle East. It is evident that efforts to communicate with such persons by advertising or broadcasting in the local media are futile. Finally it was also shown that many farmworkers are illiterate, unable to read even in one of the foregoing languages; in such circumstances, of course, printed messages in handbills, mailings, or local newspapers are equally incomprehensible.[12]

[12]Even in the industrial context the true effectiveness of "traditional" alternative methods of communicating with workers has been seriously questioned. Thus the Second Circuit Court of Appeals has observed that "The chances are negligible that alternatives equivalent to solicitation in the plant itself would exist. In the plant the entire work force may be contacted by a relatively small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness. Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket. Television and radio appeals, where not precluded entirely by cost, would suffer from competition with the family's favorite programs and at best would not compare with personal solicitation. Newspaper advertisements are subject to similar objections. Sidewalks and street corners are subject to the vicissitudes of climate and often force solicitation at awkward times, as when employees are hurrying to or from work." (*N. L. R. B. v. United Aircraft Corp., Pratt & Whitney Air. Div.* (2d Cir. 1963) 324 F.2d 128, 130.) Similar criticisms have been voiced in the legal literature. (See, e.g., Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act* (1964) 78 Harv.L.Rev. 38, 95-96; Gould, *The Question of Union Activity on Company Property* (1964) 18 Vand.L.Rev. 73, 99-100, 102-103.)

In addition, the problem here is compounded by the provisions of the ALRA which require swift elections—a difficulty not faced by the NLRB. In all cases involving crops with short harvest seasons, the union petitioning for the election has only a brief time in which to gather the necessary employee signatures. (Lab. Code, § 1156.3, subd. (a).) An intervening union will have even less time—at most 6 days—to obtain the signatures of 20 percent of the workers in order to qualify for the ballot. (*Id.*, subd. (b).) And both unions have only a few days thereafter to explain their positions to the workers. In such circumstances most of the channels of communication which have been used in organizing industrial laborers, and which were found sufficient in *Babcock*

& Wilcox and its progeny, are simply too slow to be effective.[13]

On the basis of the foregoing evidence the ALRB formally found that "Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor. (Cal. Admin. Code, tit. 8, pt. II, § 20900, subd. 3, p. 1051.) From this finding—and in furtherance of the expressed intent of the framers of the act—the board concluded *(id.,* subd. 4) that "The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections."

We conclude from the foregoing that the decision of the board to create a limited right of access by means of a detailed and specific regulation does not conflict with any intent of the Legislature inferable from its enactment of sections 1148 and 1152.

[13]For example, the board heard testimony that although the home addresses of farmworkers can be obtained from the Department of Motor Vehicles on the basis of their automobile license plate numbers, the process takes an average of two weeks and costs $2 per name.

In this connection the real parties also contend that the regulation does not follow "applicable precedents" of the NLRA under section 1148 because the right of access it declares is assertedly not limited to nonworking areas. In support they rely on a passage from *Central Hardware Co. v. NLRB* (1972) *supra,* 407 U.S. 539, 545 [33 L.Ed.2d 122, 127], in which the court summarizes the rule of *Babcock & Wilcox* as authorizing access "limited to (i) union organizers; (ii) *prescribed nonworking areas of the employer's premises;* and (iii) the duration of organization activity." (Italics added.) The purpose of the emphasized limitation, presumably, is to prevent disruption of work. But the regulation here challenged achieves the same goal, although by a method more appropriate to the California agricultural setting in which the ALRB must operate.

As we have seen, there was evidence before the board that many ranches have no public or "nonworking" areas such as the parking lots of large factories. Responsive to this circumstance, the present regulation first authorizes access by farm labor organizers for a prescribed time prior to and at the close of the work day in "areas in which employees congregate before and after working." (Fn. 4, *ante.*) No more precise description is possible, as these areas will vary from ranch to ranch; in each instance, however, no disruption of work is permitted because the access is expressly limited to nonworking hours.

Secondly, and in further distinction to the typical industrial scene, California farm properties generally

do not have cafeterias or lunchrooms where the employees assemble for their midday meal. Rather, in the case of row crops the workers frequently eat in or near their cars or at the bus at the edge of the field, while in harvesting tree crops they often remain on the job site while they take their food and rest. Again responsive to these conditions, the regulation permits access for a prescribed time "at such location or locations as the employees eat their lunch." Although this description may include working areas in certain cases, access at all such locations is primarily restricted to the nonworking period of the "lunch break" and in any event the regulation expressly prohibits any disruption of "the employer's property or agricultural operations, including injury to crops or machinery." (Fn. 4, *ante*.) The regulation thus comports with the spirit if not the letter of the quoted language of *Central Hardware*, and cannot be deemed to contravene the asserted implication of section 1148.

Next it is contended that the access regulation conflicts with an implied intent of the ALRA derived not from a provision thereof but from the absence of such a provision. The real parties stress that one of the proposed farm labor bills which was *not* enacted into law (Assem. Bill No. 1 (1975-1976 Reg. Sess.)) contained a provision (§ 1149.3, subd. (b)) expressly permitting access by farm labor organizers to employers' property, while the bill which finally became the ALRA (Sen. Bill No. 1 (1975 Third Ex. Sess.)) is silent on the point. This fact is said to reveal an unstated intent of the Legislature that no such access be permitted.

The contention is not persuasive. At best, "Legislative silence is a Delphic divination." (*Alabama-Tennessee Natural Gas Co. v. Federal Power Com'n* (5th Cir. 1966) *supra*, 359 F.2d 318, 333.) It is true that in two recent cases we have given weight to an argument superficially similar to that now advanced by the real parties. (*Cooper v. Swoap* (1974) 11 Cal. 3d 856, 863-865 [115 Cal.Rptr. 1, 524 P.2d 97]; *Clean Air Constituency v. California State Air Resources Bd.* (1974) *supra*, 11 Cal.3d 801, 817-818.) But in the circumstances which led to the passage of the ALRA, the reasoning of those decisions is inapposite.

This was not the *Cooper* situation, in which the Legislature rejected three successive attempts to add a certain provision to a welfare bill which thereafter became law, and the agency administering the ensuing statute nevertheless adopted a regulation "reviving" that provision. Nor is *Clean Air* relevant, for in that case an administrative agency charged with promptly adapting a certain antipollution program declined to do so even after the Legislature itself considered and rejected no less than five proposals to order or permit a delay.

In the case before us there was no such sequence: in this respect Senate Bill No. 1 was not merely an amended version of Assembly Bill No. 1, but an entirely new approach. Indeed, when the bills are closely compared it becomes apparent that the absence of a specific access provision in Senate Bill No. 1 is, if anything, an indication that the Legislature intended to adopt rather than reject the access principle. Assembly Bill No. 1 contained a number of proposed

sections declaring various rights and duties derived from NLRA precedents, including a specific right of access. Senate Bill No. 1, however, adopted a different technique: instead of listing the substance of NLRA precedents individually as did Assembly Bill No. 1, it simply incorporated them by reference via section 1148. Thus the omission in Senate Bill No. 1 of any of the foregoing provisions of Assembly Bill No. 1 was a natural consequence of the legislative device employed; and rather than being of negative significance, the statutory history now stressed by the real parties can plausibly be taken to mean that the Legislature affirmatively intended to adopt the access principle of *Babcock & Wilcox* as herein defined.

Lastly it is urged that the access regulation violates yet another rule discussed in *Clean Air* (11 Cal.3d at p. 816): "An unconstitutional delegation of power occurs when the Legislature confers upon an administrative agency the unrestricted authority to make *fundamental policy determinations.* [Citations.]" (Italics added.) Again the present case is distinguishable. In *Clean Air* the "fundamental policy determination" by the agency was to totally reverse a clearly established legislative priority of pollution-free air—and environmental protection generally—over concern for increased gasoline consumption. In the cases cited in *Clean Air* on this point *(id.,* at pp. 816-817), administrative decisions of similar magnitude were involved.

In the case at bar the "fundamental policy determination" was made by the Legislature when that body

decided, after much study and discussion, to grant to agricultural workers throughout California the rights of self-organization and collective bargaining so long denied to them under federal law. Seen in the perspective of that momentous decision, the board's qualified access provision appears much less important than the real parties would have us believe. As a regulation which in essence merely implements one aspect of the statutory program—the holding of secret elections—it does not amount to a "fundamental policy determination" within the meaning of the quoted rule.

IV

Taking a different tack, the real parties contend the access regulation is invalid because it assertedly conflicts with the general criminal trespass statute. (Pen. Code, § 602.) The contention fails largely for reasons we have already explored.

It is settled that "Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government." *(Morris v. Williams* (1967) *supra,* 67 Cal.2d 733, 737.) Nor is the motivation of the agency relevant: "It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." *(City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 374 [88 Cal. Rptr. 12].)

The doctrine has been most frequently invoked to strike down administrative regulations in conflict with the statute which created the agency or which the agency is authorized to administer. (See, e.g., *California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 242-243 [113 Cal.Rptr. 154, 520 P.2d 970]; *Mooney v. Pickett* (1971) 4 Cal.3d 669, 680-681 [94 Cal.Rptr. 279, 483 P.2d 1231]; *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal. 3d 139, 143-144 [89 Cal.Rptr. 620, 474 P.2d 436].) But the principle is equally applicable when the regulation contravenes a provision of a different statute. (See, e.g., *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734 [227 P.2d 449]; *Tolman v. Underhill* (1952) 39 Cal.2d 708 [249 P.2d 280]; *Harris v. Alcoholic Bev. etc. Appeals Bd.* (1964) 228 Cal.App.2d 1 [39 Cal. Rptr. 192].)

On the other hand, it is no less settled that when a special and a general statute are in conflict, the former controls. (Code Civ. Proc., § 1859.) "'[T]he special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.'" *(In re Williamson* (1954) 43 Cal.2d 651, 654 [276 P.2d 593]; accord, *People v. Gilbert* (1969) 1 Cal.3d 475, 479-480 [82 Cal.Rptr. 724, 462 P.2d 580], and cases cited.) This rule of construction is reiterated and specifically made applicable to the ALRA in section 1166.3, subdivision (b), of the act, which states: "If any other act of the Legislature shall conflict with the provisions of this part [i.e., the ALRA], this part shall prevail."

If the Legislature can thus depart from its existing dispositions on a given topic, it can authorize an administrative agency to do so on its behalf. Accordingly, in cases of conflict a regulation validly adopted pursuant to a delegation of authority under a special statute likewise prevails over the terms of a general statute. The Legislature can surely accomplish indirectly that which it could do directly.

The access rule here challenged is such a regulation. For the reasons stated at length hereinabove, the incorporation in section 1152 of the language of section 7 of the NLRA, together with the express direction in section 1144 that the board make regulations necessary to carry out the act and in section 1148 that it follow applicable NLRA precedents, at least mean that the Legislature intended the board to structure a qualified right of entry onto agricultural property for organizational purposes. The access regulation was adopted as an expression of that intent. It therefore prevails over the general trespass statute, by operation of both the foregoing rule of statutory construction and the specific directive of section 1166.3, subdivision (b). No act in compliance with the access regulation can be punished as a criminal trespass. (See *In re Zerbe* (1964) 60 Cal.2d 666 [36 Cal.Rptr. 286, 388 P.2d 182, 10 A.L.R.3d 840].)

Let a peremptory writ of mandate issue as prayed.

Mosk, J.

Wright, C. J., Tobriner, J., and Sullivan, J., concurred.

Dissenting Opinion

I dissent.

The access regulation of the Agricultural Labor Relations Board is invalid on three grounds. First, federal law has established that nonemployee organizers have no right of access to an employer's property whenever other reasonable means of communication are available. Even when access is permissible, it is restricted to nonworking areas. The California Agricultural Labor Relations Act of 1975 (Lab. Code, § 1140 et seq.) incorporated the federal law; the board's regulation, in authorizing access when other means of communication are available, and in permitting access to working areas, is contrary to federal law and therefore violates the state statute. Second, because the board's regulation is in conflict with the penal trespass statute it usurps the legislative function, and is thus invalid. Third, the regulation constitutes an unwarranted infringement on constitutionally protected property rights.

The Regulation Conflicts With The Agricultural Labor Relations Act

A. *The Federal Law*

Two United States Supreme Court decisions have specifically dealt with the issue of nonemployee union organizer access to private property. In *Labor Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105 [100 L.Ed. 975, 76 S.Ct. 679], employers prohibited nonemployees from distributing union literature on employer-owned parking lots. The National Labor

Relations Board (labor board) ruled that the employers' conduct constituted an unfair labor practice. The labor board based its ruling on a decision establishing that *employees* could use nonworking areas of the employer's premises for organizational activities. (*Republic Aviation Corp. v. Board* (1945) 324 U.S. 793 [89 L.Ed. 1372, 65 S.Ct. 982, 157 A.L.R. 1081].)

The court in *Babcock* unanimously ruled that the labor board had erred in failing "to make a distinction between rules of law applicable to employees and those applicable to nonemployees." (351 U.S. at p. 113 [100 L.Ed. at p. 983].)

Having identified the source of the labor board's error, the Supreme Court stated the legal principles which govern nonemployee access cases. "[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." (351 U.S. at p. 112 [100 L.Ed. at p. 982].)

In *Central Hardware Co. v. NLRB* (1972) 407 U.S. 539 [33 L.Ed.2d 122, 92 S.Ct. 2238], the second United States Supreme Court decision, the labor board again found an employer to have engaged in an unfair

labor practice by excluding nonemployee union organizers from its parking lot. In making this ruling, the labor board decided that the employer had violated First Amendment rights of the employees under *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 [20 L.Ed.2d 603, 88 S.Ct. 1601].

The Supreme Court reversed, ruling that *Logan Valley's* First Amendment analysis was inapplicable, and that if the labor board's attempt to apply *Logan Valley* to nonemployee organizers were allowed to stand, it would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." (407 U.S. at p. 547 [33 L.Ed.2d at p. 129].)

The Supreme Court reiterated its *Babcock* holding that nonemployee organizers may not be allowed access when other reasonable means of communication are available. The court added: "The principle of *Babcock* is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights.[1] After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas

[1]Section 7 of the National Labor Relations Act is substantially identical to Labor Code section 1152.

of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (407 U.S. at pp. 544-545 [33 L.Ed.2d at p. 127].) The dissent in *Central Hardware* did not relate to the points involved here. Even the dissenting justices expressly stated that the labor board should have followed *Babcock*.

The federal law of nonemployee access is therefore settled, establishing that there is no right of access where alternative methods of communication exist. If there are no alternative methods, the nonemployees' right of access is limited to prescribed nonworking areas of the employer's premises. The Supreme Court has expressly held that the broader right of *employees* to engage in organizational activities recognized by *Republic Aviation v. Board, supra,* 324 U.S. 793, does not apply to the nonemployee organizer. *Employee* organizers are legally upon the employer's premises as employees; thus, their presence usually does not interfere with the employer's property rights. The employer's interest in securing effective work is the only interest subject to potential interference. Accordingly, the limitation on employees' right to organize relates to discipline. Nonemployee organizers, however, are not invited on the premises. In this situation, not only is the employer's interest in securing effective work jeopardized, but his property rights under the United States Constitution are interfered with as well.

B. *The Legislature's Incorporation of the Federal Law*

Labor Code section 1152 establishes the right of employees to organize. That section contains language identical to section 7 of the National Labor Relations Act,[2] the section applied in *Babcock* and *Central Hardware*. Labor Code section 1148 states: "The board *shall* follow *applicable precedents* of the National Labor Relations Act, as amended." (Italics added.)

"When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes. [Citations.]" (*Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 688-689, [8 Cal.Rptr. 1, 355 P.2d 905].)

In *Los Angeles Met. Transit Authority,* as in the instant case, the Legislature had used language from section 7 of the National Labor Relations Act. This court held that, because the federal courts had interpreted part of the language to include the right to strike, the Legislature intended to grant a right to strike despite the fact that the state statute applied

[2]The operative language of section 1152 is identical to section 7. The only difference between the statutes is that section 7 cross-references to another federal statute while section 1152 cross-references, of course, to a state statute.

to governmental employees who ordinarily have no such right.

By using the language of section 7, the Legislature clearly manifested its intention to adopt the federal construction of section 7. In *Babcock* and *Central Hardware,* the United States Supreme Court construed section 7. That construction was therefore adopted by our Legislature when it enacted section 1152. Any doubt in the matter was eliminated when the Legislature, in section 1148, expressly required the board to follow applicable federal precedents. Accordingly, the inescapable conclusion is that the Legislature intended the board to apply the rule of *Babcock* and *Central Hardware,* which denies access rights to nonemployee organizers when reasonable alternative methods of communication are available.[3]

It is generally recognized that the Agricultural Labor Relations Act of 1975 is a compromise among the various interests. *(Levy, The Agricultural Relations Act of 1975—La Esperanza de California Para*

[3]The majority attempts to characterize the access regulation as "limited in purpose, in time and place, and in the number of organizers . . . ." (*Ante,* p. 400.) But in characterizing these as limitations, the majority relies on the irrelevant. These limitations in no way indicate the unavailability of alternative means of communication—the very showing that must be made before any access, regardless of how limited, is permitted. Moreover, the majority's statement that elections under the ALRA are required to be held within short periods of time (*ante,* p. 416), while true, has nothing to do with the access regulation. The elections must be held within seven days of the filing of a petition signed by a majority of the currently employed. (Lab. Code, § 1156.3, subd.(a).) However, the access regulation does not limit access to the period following the filing of a petition. The regulation is thus open-ended and the infringement on property rights it sanctions—contrary to the majority's implication—is therefore neither limited in time nor is it minimal.

El Futuro (1975) 15 Santa Clara Law. 783.) When the competing interests agreed to compromise, the Legislature was faced with three choices: it could turn the board loose with little definition of its duties, powers, limitations on those powers, or standards to be applied; it could, on the other hand, sharply define the duties, powers, limitations, and standards; or it could incorporate the highly developed federal law, which had over a period of 40 years arrived at definitions of both the rights and interests of the affected parties, as well as the duties, powers, limitations, and standards of the administrative agency.

The Legislature chose to incorporate the highly developed federal law. This is clear from its adoption of section 1152, which is substantially identical to section 7 of the National Labor Relations Act, and adoption of section 1148, which requires the board to rely on applicable federal precedents.

The majority, of course, is not unmindful of the necessity to resort to federal law. There is no specific mention of a right of access in the act (other than for board officials) and no express delegation empowering the board to adopt a right of access. The majority, in finding a right of access, relies upon sections 1148 and 1152, which adopt federal law, and section 1144 which grants general rule-making powers to the board. Obviously, a general rule-making power with no specification as to what those rules relate is not the same as an express power to create access rights. It is evident that the majority must resort to federal law to find board authority to create access rights.

It is manifestly unfair to the Legislature, in light of the history and language of the act, to rely on federal law to establish board power to create an access right, and at the same time to ignore the standards and limitations placed upon that right by the same federal law. Rather, the Legislature's incorporation of the federal law includes the duties, powers, limitations, and standards.

Although the board is given general rule-making power, regulations adopted pursuant to this power must conform to the legislative command requiring application of federal law. As this court stated in *Morris v. Williams* (1967) 67 Cal.2d 733 [63 Cal. Rptr. 689, 433 P.2d 697]: "Under Government Code section 11373, 'Each regulation adopted [by a state agency], to be effective, must be within the scope of authority conferred. . . .' Whenever a state agency is authorized by statute 'to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, *no regulation adopted is valid or effective unless consistent and not in conflict with the statute. . . .*' (Gov. Code, § 11374.) Our first duty, therefore, is to determine whether the Administrator exercised quasi-legislative authority within the bounds of the statutory mandate. While the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight, nevertheless 'Whatever the force of administrative construction . . . final responsibility for the interpreta-

tion of the law rests with the courts.' *(Whitcomb Hotel v. California Emp. Com.* (1944) 24 Cal.2d 753, 757 . . . , and authorities there collected.) Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. *(Whitcomb Hotel v. California Emp. Com., supra; Hodge v. McCall* (1921) 185 Cal. 330, 334 . . .; *Boone v. Kingsbury* (1928) 206 Cal. 148, 161-162 . . .; *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550 . . .; see *Brock v. Superior Court* (1938) 11 Cal.2d 682, 688 . . . .)" (67 Cal.2d at p. 748.)

C. *The Regulation's Conflict With the Federal Law and the Statute*

As we have seen, the federal law incorporated in the act by the Legislature denies access to nonemployee organizers whenever reasonable alternative means of communication are available. Further, even when access is allowed, it is restricted to nonworking areas. By permitting blanket access to all agricultural property, regardless of the existence of alternative means of communication, and by permitting access to working areas, the board's regulation is contrary to *Babcock* and *Central Hardware,* violating the statutory command to follow federal precedent.

The conflict may not be avoided on the basis of the board's finding that "[g]enerally" there is no alternative means of communication. The absence of alternative means of communication in *most* cases does

not relieve the board of its obligation to adhere to *Babcock* and *Central Hardware* any more than an N.L.R.B. finding of the availability of alternative means of communication in *most* cases would justify the N.L.R.B. from denying nonemployee access in all cases.

CONFLICT WITH TRESPASS STATUTE

Penal Code section 602 provides in relevant part: "Every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: (j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession. [¶] (k) Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another . . . without the written permission of the owner of such land, his agent or the person in lawful possession, and [¶] (l) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, . . . [¶] (l) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof. [¶] (m) Driving any vehicle . . . upon real property belonging to or lawfully occupied by another and known

not to be open to the general public, without the consent of the owner, his agent, or the person in lawful possession thereof. [¶] (n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by a peace officer and the owner, his agent, or the person in lawful possession thereof."

The conflict between the access regulation and the trespass statute is apparent.

The law regarding conflict between administrative acts and legislative acts is well-settled. "*Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them.* They must conform to the legislative will if we are to preserve an orderly system of government." (*Morris v. Williams, supra,* 67 Cal.2d 733, 737; italics added.) "It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are." (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal. App.3d 365, 374 [88 Cal.Rptr. 12].)

Administrative agencies "may not exercise [their] sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered. Administrative regulations in conflict with the Constitution or statutes are generally declared to be null or void. (*Hammond v. McDonald,* 49 Cal.App. 2d 671, 679 . . .; *Hodge v. McCall,* 185 Cal. 330, 334 . . . .)" (*Harris v. Alcoholic Bev. etc. Appeals Bd.*

(1964) 228 Cal.App.2d 1, 6; Accord: *Morris v. Williams, supra,* 67 Cal.2d 733, 748-749; *Duskin v. State Board of Dry Cleaners* (1962) 58 Cal.2d 155, 161-162 [23 Cal.Rptr. 404, 373 P.2d 468]; *Schenley Industries, Inc. v. Munro* (1965) 237 Cal.App.2d 106, 111 [46 Cal.Rptr. 678]; *Am. Distilling Co. v. St. Bd. of Equalization* (1942) 55 Cal.App.2d 799, 805-806 [131 P.2d 609].)

As the court in *Harris v. Alcoholic Bev. etc. Appeals Bd., supra,* noted: "The order of priority with respect to jurisdiction, accordingly, is as follows: (1) The Constitution is the supreme expression; (2) to the extent that it does not conflict with the Constitution, the Legislature may act; (3) to the extent that it does not conflict with the Constitution, *or with lawful acts of the legislature,* the department [administrative agencies] may act through its rules and regulations." (228 Cal.App.2d at p. 7; italics added.)

The doctrine that administrative regulations are subordinate and must give way to legislative enactments is equally applicable when the regulation contravenes a provision of a statute or code other than the statutes creating the agency or administered by it. (*Tolman v. Underhill* (1952) 39 Cal.2d 708, 712 [249 P.2d 280]; *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 737-738 [227 P.2d 449]; *In re Potter* (1913) 164 Cal. 735, 739 [130 P. 721]; *Cleveland Chiropractic College v. State Bd. of Chiropractic Examiners* (1970) 11 Cal.App.3d 25, 34-35 [89 Cal. Rptr. 572]; *Harris v. Alcoholic Bev. etc. Appeals Bd., supra,* 228 Cal.App.2d 1, 6.)

The Legislature, as the majority points out, may make exceptions to other statutes and may expressly authorize an administrative agency to make exceptions. Such exceptions may also be made by the incorporation of other law, including federal law. In addition, an agency's right to make an exception to general statutory provisions might be implied in cases of necessity, when exercise of a power expressly granted to the agency will necessarily involve a violation of the other statute. In these circumstances, exceptions are warranted by the general principle that specific statutory provisions govern general ones. (Code Civ. Proc., § 1859; *People v. Gilbert* (1969) 1 Cal.3d 475, 479-480 [82 Cal.Rptr. 724, 462 P.2d 580].)

However, the special-general principle does not apply when the agency's power to act is not express but merely implied. Because the agency's power is implied, it can never be special in relation to a conflicting express legislative declaration. If the rule were otherwise, agencies in their field of expertise would be free to ignore almost all statutes enacted by the Legislature.

The Legislature has not expressly provided for access by nonemployee organizers to employer property. Nor has the Legislature expressly delegated to the board the authority to formulate an access rule. Having refused to follow *Babcock* and *Central Hardware* and the federal law, the majority may not properly claim that the Legislature incorporated an access rule by reference to federal law. Nor has the board or the majority shown it to be absolutely necessary to sanction violations of the Penal Code in order to effectuate the powers expressly granted to the board.

The Agricultural Labor Relations Act deals with labor relations; it does not deal with trespasses to real property. Penal Code section 602 deals with trespass to real property; its relevant provisions do not expressly deal with labor relations. The instant case deals with labor relations *and* trespasses. Thus each *statute* is on par with the other, and the Penal Code provision being a legislative enactment, it must take precedence over the administrative regulation based on a power implied from the labor statute. Moreover, if either the act or the Penal Code provisions must be categorized as special in relation to the activities before us, the Penal Code provisions should be so categorized. Related provisions of the Penal Code expressly deal with both trespasses and labor relations (Pen. Code, §§ 552.1, 555.2), and in *In re Zerbe* (1964) 60 Cal.2d 666, 668-669 [36 Cal.Rptr. 286, 388 P.2d 182, 10 A.L.R.3d 840], it was held that the provisions of those sections must be read into section 602, subdivision (*l*), one of the subdivisions presently before us.

Constitutionality Of The Access Regulation

The majority concludes that the access regulation is constitutional and does not impinge upon private property rights because a rational relationship exists between the access regulation and the purposes of the act. The majority finds that the rational relationship

test is the proper standard for constitutional review by analogizing the issue here presented to the issues raised when the validity of a zoning ordinance is challenged. The majority, however, has erred in its analogy, applied an improper standard of constitutional review, and thereby sanctioned an impermissible invasion on constitutionally protected property rights.[4]

When regulations such as zoning are challenged, the constitutional issue raised is the extent to which the government may regulate *a landowner's use* of his own property. The access regulation, on the other hand, presents a very distinct situation. In promulgating such a regulation the government is requiring a property owner to surrender the use of his private property not for public use but *for the use of other private parties*—nonemployee union organizers.

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[4]The majority justifies its application of the rational relationship test on grounds that the access regulation's infringement of property rights is "not a deprivation of 'fundamental personal liberties.' " However, property rights are fundamental and personal. As the United States Supreme Court pointed out in *Lynch v. Household Finance Corp.* (1972) 405 U.S. 538 [31 L.Ed.2d 424, 92 S.Ct. 1113], "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defense of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries 138-140." (*Id.*, at p. 552 [31 L.Ed.2d at pp. 434-435].)

The distinction is of major significance. In the private access situation we must weigh the strength of the interest asserted against the infringement on private property rights. The proper judicial function is to balance the competing interests; although the rational relationship test applies in zoning cases, the law of zoning is not a universal solvent in which property rights are dissolved.

This court is apparently the only court unable to grasp that the appropriate standard for review is one of balancing and not of rational relationship. In *Labor Board v. Babcock & Wilcox Co., supra,* 351 U.S. 105, the United States Supreme Court stated: "This is not a problem of always open or always closed doors for union organization on company property.... *Accommodation* between the two [organizational rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." (*Id.,* at p. 112: italics added.) Similarly, in *Central Hardware Co. v. NLRB, supra,* 407 U.S. 539, the Supreme Court stated: "the *principle of accommodation* announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (*Id.,* at p. 545; italics added.) The proper test is one of balancing, not a determination of rational relationships.

The federal Courts of Appeals have fully recognized that balancing is the proper standard for review. (E.g., *N. L. R. B. v. Visceglia* (3d Cir. 1974) 498 F.2d 43, 45; *McDonnell Douglas Corporation v.*

N. L. R. B. (8th Cir. 1973) 472 F.2d 539, 544; *Diamond Shamrock Co. v. N. L. R. B.* (3d Cir. 1971) 443 F.2d 52, 56-58; see *Asociacion de Trabajadores, Etc. v. Green Giant Co.* (3d Cir. 1975) 518 F.2d 130, 135; *Petersen v. Talisman Sugar Corporation* (5th Cir. 1973) 478 F.2d 73, 82.)

Indeed, in the only federal Court of Appeals case decided after *Babcock* and *Central Hardware* specifically discussed by the majority, the court recognized that the proper standard for resolving this issue is one of balancing. (*N. L. R. B. v. S & H Grossinger's Inc.* (2d Cir. 1967) 372 F.2d 26, 29-30.) Moreover, the fact that access has been permitted in several federal cases is hardly surprising under a balancing test. However, it does not follow, as the majority suggests, that because the balance in some cases has favored access that the balance in all cases will do so. If this were otherwise then the United States Supreme Court's use of the word "accommodate" is meaningless, as is the federal Courts of Appeals' continual use of a balancing approach.

The United States Supreme Court balanced the competing interests in *Babcock* and *Central Hardware,* and because, as pointed out above, the board's regulation violates the rule of those cases, the access regulation violates the constitutional provisions protecting private property. The board's regulation does not even attempt to balance or accommodate the competing interests. It allows access when alternative means of communication do in fact exist. And it permits blanket entry onto private property during work-

ing hours. The regulation as presently promulgated is unconstitutional.

CONCLUSION

In a case such as this, where conviction and feeling run high, we should apply the law to the facts carefully and objectively, to assure that the result of our decision comports with precedent, thereby carrying out the intent of the Legislature. In this, the majority have failed today. To reach their result, they have relied on inapplicable precedent, applied the wrong constitutional standard of review, nullified the Legislature's mandate to the board, and subordinated the Legislature to an administrative agency.

Clark, J.

McComb, J., and Richardson, J., concurred.

Appendix B

S. F. No. 23,349

In the Supreme Court
of the
State of California

Agricultural Labor Relations Board, Roger Mahoney, Leroy Chatfield, Joseph Grodin, Richard Johnsen, Joseph Ortega and Walter Kintz,
Petitioners,

vs.

Superior Court in and for the County of Tulare, State of California,

and

Superior Court in and for the County of Fresno, State of California,
Respondents,

and

Harry Kubo, an individual; Nisei Farmers League, a non-profit corporation; and Western Tomato Growers & Shippers, Inc., a California corporation,

and

Pandol & Sons, a California partnership; Jasmine Vineyards, Inc., a California corporation,
Real Parties In Interest.

[Filed Mar 8, 1976]

Notice of Appeal To The Supreme Court of the United States

Notice is hereby given that Harry Kubo, Nisei Farmers League, and Western Tomato Growers & Shippers, Inc., real parties in interest above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, directing that a peremptory writ of mandate issue compelling respondent Superior Courts of Tulare and Fresno Counties to vacate various orders enjoining enforcement of an administrative regulation which permits access to agricultural property by farm labor organizers, entered in this action on March 4, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: March 8, 1976.

Littler, Mendelson & Fastiff
By J. Richard Thesing
Attorneys for Appellants
Harry Kubo, Nisei Farmers
League, and Western Tomato
Growers & Shippers, Inc.

Appendix C

EMERGENCY ORDER ADOPTING EMERGENCY REGULATIONS OF THE AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board having met in session since August 28, 1975, finds that the Statement of Emergency approved in regulations of August 28, 1975, continues to apply.

Adopts Chapter 9 to read:

Chapter 9. *Access to Workers in the Fields by Labor Organizations*

Labor Code Sec. 1140.2 declares it to be our policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing.

1. Agricultural employees have the right under Labor Code Sec. 1152 to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as the right to refrain from any or all of such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of continued employment. Labor Code Sec. 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of these rights.

2. As the United States Supreme Court has stated: Organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer.

3. Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.

4. The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issue to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections.

5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 to include

the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:

a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular

organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this Act have been certified.

Finding of Emergency

The Agricultural Labor Relations Board finds that an emergency exists, and that the foregoing regulations are necessary for the immediate preservation of the public health, safety, or general welfare. A statement of such facts constituting an emergency is:

Statement of Facts

The Agricultural Labor Relations Act of 1975 is designed to define and protect the rights of agricultural employees and agricultural employers. The Act defines the rights of agricultural employees to include organizing and bargaining collectively with their employers through representatives of their own choosing. To ensure that agricultural employees can freely choose their own representatives for the purpose of collective bargaining, the Act establishes a procedure by which they can exercise their choice at a secret ballot election conducted by the Agricultural Labor Relation Board. To protect the rights of agricultural employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, the Act also defines certain practices of employers and unions as unfair labor practices.

The Act is administered and enforced by the Agricultural Labor Relations Board. The general counsel of the Board and his staff investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. The five-member Board decides cases involving charges of unfair labor practices and determines certain representation election questions.

The Act does not set forth in detail many of the procedures used by the Board in administering and enforcing the Act. Instead, the Legislature delegated to the Board the authority to adopt regulations which are necessary to carry out the provisions of the Act relative to representation cases and unfair labor practice cases.

The Agricultural Labor Relations Board has reason to believe that unfair labor practice charges are likely to be filed on or soon after August 28, 1975, the effective date of the Act. The Board has also determined that it will begin accepting representation case petitions on September 2, 1975, and it expects numerous representation case petitions to be filed on or soon after that date.

In addition, the strict time limitations contained in the Act relative to the holding of elections and to the expeditious processing of certain categories of unfair labor practice charges make even more apparent the necessity of having regulations covering these matters in effect on August 28, 1975, or as soon thereafter as possible. For instance, Labor Code Sec. 1156.3 requires that the Board *immediately* investigate a

petition for representation and, additionally, that any representation election ordered pursuant thereto be held within a maximum of *seven* days of the filing of a petition.

Moreover, in enacting this legislation the people of the State of California sought to ensure peace in the agricultural fields by guaranteeing stability in labor relations. The events of the past decade demonstrate that unrest and strife may occur in the absence of orderly procedures for resolving labor disputes. In light of the foregoing, the Agricultural Labor Relations Board has reason to believe that there exists a potentially volatile condition in the agricultural fields of the state which requires definite and orderly procedures to ensure immediate and effective enforcement of the Act.

Also, the Legislature, in providing that the Act becomes effective on August 28, 1975, fully intended that the Agricultural Labor Relations Board be prepared to administer and enforce the Act on the date it becomes effective. In order to comply with the legislative mandate, it is essential that the Board immediately adopt regulations to enforce the Act.

The current situations therefore suggests [sic] to the Board the urgent and immediate necessity of adopting detailed regulations covering these matters to become effective on August 28, 1975, or as soon thereafter as is possible.

Inasmuch as the five-member Board responsible for adopting regulations is not authorized by law to adopt regulations until August 28, 1975, it is, therefore,

appropriate and necessary to the efficient administration of the Act, that regulations relative to the filing of representation case petitions and unfair labor practice charges which are intended to become effective on or soon after August 28, 1975, be adopted as emergency regulations as defined in the Administrative Procedure Act (Gov. Code Sec. 11370 et seq.).

Accordingly, these regulations are hereby adopted as emergency regulations to take effect immediately upon filing with the Secretary of State as provided in Gov. Code Sec. 11422(c). The Agricultural Labor Relations Board has determined that the above regulations will have no cost to local government pursuant to Sec. 2231 of the Revenue and Taxation Code.

Appendix D

Superior Court of the State of California
for the County of Fresno

No. 172286

Harry Kubo, an individual; and Nisei Farmers League, a nonprofit corporation; Western Tomato Growers & Shippers, Inc., a California corporation,

Plaintiffs/Petitioners,

vs.

Right Reverend Roger Mahoney, Chairman; Joseph Grodin, Richard Johnson, Leroy Chatfield, and Joseph Ortega, Members of the California Agricultural Labor Relations Board,

Defendants/Respondents.

[Filed Sept. 10, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on an Order to Show Cause on September 10, 1975 at 9:30 a.m., before the Court. Plaintiffs/Petitioners appeared through their counsel Jordan L. Bloom, Esq., and Defendants/Respondents appeared through Robert Le Prohn, Esq.

The Court having examined the pleadings and the documentary evidence introduced herein, including the Declarations and Memoranda of Points and Authorities, and having heard the arguments of counsel; and the cause having been submitted for decision; the Court, being fully advised in the matter, finds and concludes as follows:

FINDINGS OF FACT

I

Plaintiff/Petitioner Harry Kubo is an individual engaged in the cultivation and harvesting of agricultural products and is an agricultural employer within the meaning of Section 1140.4(c) of the California Labor Code. Said Plaintiff/Petitioner's agricultural premises are located in Fresno County, and Plaintiff/Petitioner Kubo employs agricultural employees, as said term is defined in Labor Code Section 1140.4(b) in the cultivation and harvesting of agricultural products on said premises. Plaintiff/Petitioner Kubo is a member and the President of Plaintiff/ Petitioner Nisei Farmers League.

II

Plaintiff/Petitioner Nisei Farmers League is a nonprofit California corporation composed of approximately 1,300 growers engaged in the cultivation and harvesting of agricultural products. Said grower members of the Nisei Farmers League are agricultural employers within the meaning of Section 1140.4(c) of the California Labor Code. The agricultural property

of said growers is located in Fresno, Madera, Tulare and Kings Counties. Said growers employ agricultural employees as said term is defined in Labor Code Section 1140.4(b). Plaintiff/Petitioner Nisei Farmers League is authorized to bring and does bring this action by and on behalf of its members.

III

Plaintiff/Petitioner Western Tomato Growers & Shippers, Inc., is a California corporation engaged in the cultivation and harvesting of agricultural products and is an agricultural employer within the meaning of Section 1140.4(c) of the California Labor Code. Said Plaintiff's/ Petitioner's operations are located in the Counties of Fresno and San Joaquin. Plaintiff/ Petitioner Western Tomato Growers & Shippers, Inc., employs agricultural employees as said term is defined in Labor Code Section 1140.4(b).

IV

Defendants/Respondents The Right Reverend Roger Mahoney, Joseph Grodin, Richard Johnson, Leroy Chatfield and Joseph Ortega, are duly appointed members of the Agricultural Labor Relations Board, whose composition and duties are particularly described in California Labor Code Section 1141, *et seq.*, popularly known as the Agricultural Labor Relations Act. At all times mentioned herein, Defendants/Respondents were acting as Members of the said Board. Said Board maintains offices at various locations throughout the State of California, including a regional office in Fresno, California.

V

On August 29, 1975 Defendants/Respondents, acting as the Agricultural Labor Relations Board, adopted certain so-called "Emergency Regulations of the Agricultural Labor Relations Board." Chapter 9 of said regulations is entitled "Access To Workers In The Fields By Labor Organizations", and provides in relevant part as follows:

> "5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:
>
> (a) Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 30 minutes after the completion of work to meet and talk with employees in areas where employees congregate before and after working.
>
> (b) In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.
>
> (c) Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

> (d) Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.
>
> (e) The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.
>
> (f) Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this Act have been certified."

VI

The fields and orchards located on Plaintiffs/Petitioners' agricultural premises are private property posted against trespass and not open to any of the public or to persons not employed by Plaintiffs/Petitioners.

VIII

If non-employee union organizers are allowed to come onto Plaintiffs/Petitioners' private fields and orchards, Plaintiffs/Petitioners' peaceful use and enjoyment of their private property will be repeatedly and continuously impaired, and Plaintiffs/Petitioners will thereby be irreparably harmed. Such violations and impairment of Plaintiffs/Petitioners' rights are not compensable in monetary damages.

IX

If non-employee union organizers are allowed to come onto Plaintiffs/Petitioners' private fields and orchards, Plaintiffs/Petitioners will be subject to property damage to their crops, equipment and land; interference with their agricultural operations; disruption of work; and possible violent confrontations among rival union organizers or among union and anti-union factions. Plaintiffs/Petitioners will thereby suffer irreparable and permanent injury.

X

If Plaintiffs/Petitioners and other agricultural employers rely on trespass statutes to exclude non-employee union organizers from their property, they will be subject to false arrest actions, unfair labor practice charges and the probable refusal of the Agricultural Labor Relations Board to certify any secret ballot elections which are lost by labor organizations denied access to the agricultural employers' property. Plaintiffs/Petitioners accordingly have no plain. speedy and adequate remedy at law.

XI

A provision allowing non-employees union organizers access to the private property of agricultural employers was rejected by the California Legislature and stricken from the bill passed as the Altorre-Zenovich-Dunlap-Berman [sic] Agricultural Labor Relations Act of 1975.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the subject matter of this action pursuant to California Code of Civil Procedure Section 526, 1060, *et seq.*, and 1085; Government Code Section 11440; and Labor Code Section 1144.

II

Chapter 9 of the Emergency Regulations adopted by Defendants/Respondents on August 29, 1975, grants non-employee labor union organizers absolute access to Plaintiffs/Petitioners' fields and orchards and other properties, and those of all other agricultural employers under the Act, irrespective of the facts that said properties are private, posted against trespassing, and not open to members of the public or other non-employees of Plaintiffs/Petitioners; and irrespective of whatever other reasonable means of communications such organizers may have with respect to Plaintiffs/Petitioners' employees.

III

Chapter 9 of the Emergency Regulations adopted by Defendants/Respondents on August 29, 1975 violates the Fifth and Fourteenth Amendments of the United States Constitution and Article I §7 of the California Constitution in that it deprives Plaintiffs/Petitioners and other agricultural employers of property rights without due process of law and further constitutes a taking of Plaintiffs/Petitioners' property for public use without just compenstion.

V

Chapter 9 of the Emergency Regulations of the Agricultural Labor Relations Board constitutes an impermissible enlargement of the authority granted to the Board under the enabling statute, California Labor Code Section 1144, and California Government Code Section 11371, *et seq.*, in that it constitutes a fundamental policy decision creating a right of access to private property by union organizers which is not provided for in existing statutory or case law, and which exceeds the parameters of administrative rule-making authority established by California law. As such, Chapter 9 of the Emergency Regulations is arbitrary and beyond the scope of proper procedure.

VI

Chapter 9 of the Emergency Regulations adopted by Defendants/Respondents conflicts with Penal Code Section 602(k), 602(l) and 602(n) and accordingly exceeds the Board's statutory authority under Labor Code Section 1144 and Government Code Section 11371, *et seq.*

VII

By adopting the access provisions of Chapter 9 of the Emergency Regulations, Defendants/Respondents contravened the intent of the Legislature in enacting Agricultural Labor Relations Act (Labor Code §§1140, *et seq).*

VIII

Plaintiffs/Petitioners have no plain, speedy and adequate remedy at law.

IX

If Chapter 9 of the Emergency Regulations is allowed to remain in effect, Plaintiffs/Petitioners will suffer irreparable injury to their property rights and interests.

XI

This is a proper case for the issuance of a Declaratory Judgment pursuant to California Government Code Section 11440 and California Code of Civil Procedure Section 1060 decreeing that Defendant/Respondents exceeded their statutory authority in adopting Chapter 9 of the Emergency Regulations of the Agricultural Labor Relations Board; that said Chapter 9 constitutes an unconstitutional infringement upon the property rights of Plaintiffs/Petitioners and other agricultural employers as guaranteed by the California and United States Constitutions; and that Chapter 9 of the Emergency Regulations conflicts with California Penal Code Section 602 and is therefore arbitrary and in excess of Defendants/Respondents' delegated authority.

XII

This is a proper case for the issuance of a peremptory Writ of Mandate directing Defendants/Respondents to vacate Chapter 9 of the Emergency Regulations and compelling Defendants/Respondents to refrain from enforcing or implementing Chapter 9.

Dated: Sept. 10, 1975

Hollis G. Best
Judge of the Superior Court

Superior Court of the State of California
for the County of Fresno

No. 172286

Harry Kubo, an individual; and Nisei Farmers League, a nonprofit corporation; Western Tomato Growers & Shippers, Inc., a California corporation,

Plaintiffs,

vs.

Right Reverend Roger Mahoney, Chairman; Joseph Grodin, Richard Johnson, Leroy Chatfield, and Joseph Ortega, Members of the California Agricultural Labor Relations Board,

Defendants.

[Filed Sept. 10, 1975]

JUDGMENT

The above-captioned cause came on regularly for hearing on September 10, 1975 of the above-entitled Court, the Honorable Hollis Best, Judge presiding. Plaintiffs appeared by their attorney, J. Bloom, and defendants appeared by their attorney, M. LeProhn [sic], and both oral and documentary evidence having been presented, the cause having been argued and submitted for decision, and the Court having made and caused to be filed its written findings of fact and conclusions of law,

On the basis of the findings of fact and conclusions of law filed herewith:

It Is Hereby Ordered, Adjudged, and Decreed

(1) That the Agricultural Labor Relations Board issued Chapter 9 of the Emergency Regulations in excess of the authority delegated to it by the California State Legislature in the Alatorre-Zenovich-Dunlap-Berman Agricultural Relations Act of 1975; and

(2) That Chapter 9 of the Emergency Regulations issued by the Agricultural Labor Relations Board is in excess of its statutory authority in that it is not in accordance with standards proscribed by other provisions of law; and

(3) That Chapter 9 of the Emergency Regulations issued by the Agricultural Labor Relations Board is an unconstitutional infringement upon Plaintiffs' property rights as guaranteed by both the California and United States Constitutions; and

(4) That costs of suit be awarded;

Dated: September 10, 1975

Hollis G. Best
Judge of the Superior Court

Supreme Court, U. S.
FILED
JUL 1 1976
R., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

HARRY KUBO, NISEI FARMERS LEAGUE AND WESTERN TOMATO GROWERS & SHIPPERS, INC., *Appellants,* vs. AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA, *Appellee.*	No. 75-1734
PANDOL & SONS, A CALIFORNIA PARTNERSHIP; JASMINE VINEYARDS, INC., A CALIFORNIA CORPORATION, *Appellants,* vs. AGRICULTURAL LABOR RELATIONS BOARD, *Appellee.*	No. 75-1754

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Supreme Court Rule 16(1)(b), Appellee Agricultural Labor Relations Board of the State of California hereby moves to dismiss the appeals in the above entitled cases on the ground that they do not present a substantial federal question.

OPINION BELOW

The opinion of the Supreme Court of California, applicable to both of the above entitled cases, is en-

titled *Agricultural Labor Relations Board v. Superior Court,* and is reported at 16 Cal. 3d 392, 128 Cal. Rptr. 183, 546 P. 2d 687 (1976). The decision is contained in Appendix A of the Jurisdictional Statements of both appellants.

STATUTORY PROVISION INVOLVED

This case involves the "access regulation" promulgated by the California Agricultural Labor Relations Board, 8 Cal. Admin. Code § 20900, which provides:

> *Access to Workers in the Fields by Labor Organizations.* Labor Code Sec. 1140.2 declares it to be our policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing.
>
> 1. Agricultural employees have the right under Labor Code Sec. 1152 to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as the right to refrain from any or all of such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of continued employment. Labor Code Sec. 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of these rights.

> 2. As the United States Supreme Court has stated: Organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer.
>
> 3. Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.
>
> 4. The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issue to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections.
>
> 5. Accordingly, the Board will consider the rights of employees under Labor Code Sec. 1152 to include the right of access by union organizers

to the premises of an agricultural employer for the purpose of organizing, subject to the following limitations:

a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.

b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall include such lunch break. If there is no established lunch break, the one-hour period may be at any time during the working day.

c. Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

d. Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge or other designation of affiliation.

e. The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

f. Pending further regulation by the Board, this regulation shall not apply after the results of an election held pursuant to this act have been certified.

QUESTION PRESENTED

Does the United States Constitution prohibit a California administrative agency, mandated to regulate the state's agricultural labor relations, from promulgating a regulation which grants farm labor organizers a limited right of access to agricultural property during an organizational campaign for the purpose of communicating with agricultural workers, which regulation is carefully tailored to the exigencies of California agriculture and based on a factual finding that unions seeking to organize agricultural employees generally do not have available alternative channels of effective communication?

STATEMENT OF THE CASE

For decades California has witnessed strife and conflict in its fields and vineyards. It has seen repeated clashes between farmworkers, growers, and sheriffs' deputies, which have left numerous persons injured or killed, and thousands more arrested and jailed. It has seen bitter strikes interrupt its harvest, and has watched its agricultural products boycotted throughout the land. Federal labor laws have brought no relief to the California fields because those statutes exempt agricultural employees from their coverage. 29 U.S.C. §§ 152(3), 203(f).

To bring "certainty and a sense of fair play to a presently unstable and potentially volatile condition," (ALRA Preamble, Stats. 1975, Third Ex. Sess., Chap. 1, § 1), the California Legislature enacted the Agricultural Labor Relations Act of 1975 (hereinafter, "ALRA" or the "Act"). Cal. Labor Code §§ 1140, et seq. Because of the urgency of the situation, the Act was passed in an Extraordinary Session and became effective three months later, on August 28, 1975. A comprehensive agricultural labor relations statute, the ALRA establishes a five-member Agricultural Labor Relations Board (hereinafter, "ALRB" or the "Board") (Cal. Labor Code § 1141); grants employees organizational rights (Cal. Labor Code § 1152); provides for secret ballot elections to select a collective bargaining representative or no union (Cal. Labor Code §§ 1156–1159); and characterizes a variety of acts by employers or unions as unfair labor practices, including interference with employees' organizational rights. Cal. Labor Code §§ 1153–1155.7. While modeled in some respects on the National Labor Relations Act, the ALRA's election provisions are significantly different from those under the NLRA, reflecting the exigencies of a seasonal industry with a mobile workforce.

A. Adoption of the Access Regulation.

The day the ALRA went into effect, the Board held a 14-hour public hearing to determine whether, and to what extent, farm labor organizers should be

permitted access to an employer's property for organizational purposes. Under the National Labor Relations Act, the NLRB and courts have held that in order to effectuate workers' organizational rights, non-employee organizers have a right of access when no alternate effective means of communication are available. *Hudgens v. NLRB,* 96 S.Ct. 1029 (1976); *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The Board heard extensive testimony from workers, employers, unions and law enforcement officials concerning the unavailability of traditional methods for communicating with agricultural employees. The evidence showed the following: Many farmworkers are migrants. They arrive in town for the harvest, and live in labor camps, motels, or with friends and move on when the crop is in. Few farmworkers have listed local addresses or telephones. Consequently, home visits, mailings or telephone calls are unavailing. Many farmworkers are illiterate, most speak foreign languages, and few can afford to purchase radios or televisions, making communication by leaflet, newspapers or the mass electronic media very difficult. Nor can agricultural employees be readily contacted on their way to work. Farmworkers frequently obtain employment through labor contractors, who transport the employees by private buses from camp to field or from ranch to ranch, driving directly onto the premises before unloading. Because farm laborers find jobs through labor contractors

and change employers frequently, they often do not know the name of their employer, making it difficult for unions to submit valid petitions, since the workers cannot be identified with a specific employer when contacted off the job site. See summary of evidence, *ALRB v. Superior Court,* 16 Cal.3d at 414–415.

The ALRA's election provisions, geared to the unique needs of the California farm labor scene, further underscore the inadequacies of conventional means of communication. *ALRB v. Superior Court,* 16 Cal.3d at 416. "Recognizing that agriculture is a seasonal occupation for a majority of agricultural employees, and wishing to provide the fullest scope for employees' enjoyment of [electoral] rights" (Cal. Labor Code § 1156.4), the Act permits elections to be held only during peak periods of employment. *Id.;* Cal. Labor Code § 1156.3(a)(1). To trigger an election, a union must obtain the signatures of the majority of workers at a ranch. To intervene and also appear on the ballot, a second union must obtain signatures of 20 percent of the same work force. Once authorized, an election must be held quickly: within 48 hours in case of a strike, and within seven days in other cases. Cal. Labor Code § 1156.3(a), (b). Thus, in crops with short harvest seasons, the union petitioning for an election has only a brief time in which to gather necessary employee signatures. An intervening union will have even less time

—at most six days to obtain its qualifying signatures. Because of the seven-day election requirement, both unions have only a few days thereafter to explain their positions to the workers.[1]

Based on these factors, the Board found:

> "Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor." 8 Cal. Admin. Code § 20900, subd. 3.

As a result, the Board unanimously voted to adopt the challenged regulation, which permits union organizers a right of access to growers' premises, subject to carefully drawn restrictions as to purpose, time and place, number of organizers, and permissible conduct.

The Board chose to proceed by regulation, rather than by the case-by-case approach utilized by the NLRB, because of its determinations that the nature of California agriculture and farm workers would cause access to be required in the vast majority of cases, and that a case-by-case approach would be extremely costly, slow, and destructive of organizational

[1] By contrast, the average period of time between the filing of a petition and the direction of an election under the NLRA is 45 days. 40 NLRB Ann. Rep. 13 (1975). Thereafter, an election is usually not held for approximately one month. Thus, an average election under the NLRA affords the campaigning union ten times longer than under the ALRA to communicate with employees.

rights and labor stability.[2] The Board was also responding to the views of law enforcement officials, who testified that any right of access should be defined with precision and clarity. Lacking that certainty, the officers declared, they would be caught in

[2] The case-by-case approach would involve adjudication of access through the Act's unfair labor practice procedures. *See* Cal. Labor Code §§ 1160–1160.9, which are largely identical to the analogous federal provision. 29 U.S.C. § 160. Under this process, a union claiming that it had been unable to communicate with employees of a particular employer through off-the-job contact would file an unfair labor practice charge in an appropriate regional office of the Board. First, a Board agent would investigate the charges. If the investigation confirmed the union's allegations, a complaint would issue. The case would be heard in a formal proceeding before an administrative law officer or the Board itself, at which the General Counsel would have the burden of establishing that no alternative means of communication were available. Thereafter, following briefing by the parties, the administrative law officer would prepare a proposed report and recommended order. If exceptions were filed, the Board would have to review the entire record, write a decision, and issue an order Cal. Labor Code §§ 1160.2–1160.3. Like the NLRB, the ALRB lacks direct enforcement powers, and its orders may be enforced only by a court, following application by the Board. Cal. Labor Code § 1160.8.

Although the ALRB has no statistics on the length of such proceedings, under the NLRA the median time from the filing of an unfair labor practice charge until a Board decision is 350 days. *Statement by NLRB Chairman Bette Southard Murphy before the Subcomm. on Labor-Management Relations of the House Comm. on Labor,* 94th Cong., 2nd Sess. 5 (May 5, 1976). We are informed by the Division of Operations Management of the NLRB General Counsel's Office that the median time from Board decision to enforcement by the Court of Appeals is an additional 359 days.

By contrast, the access regulation imposes on employers an immediate obligation to permit access by organizers. Only if an employer wrongfully refuses, are unfair labor practice proceedings instituted, at which the only issue is whether access was denied. As a result, since the issuance of the California Supreme Court's stay, access has been immediately available at most ranches. For a fuller discussion, see Appendix A-1.

the middle, without guidance whether to arrest organizers for trespass or to assist them in exercising a lawful right of entry. The Board's reasoning was expressly incorporated into the access rule, 8 Cal. Admin. Code § 20900, subd. 4:

> "The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issue to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections."

B. Court Proceedings.

The rule became effective August 29, 1975. On September 10, 1975 the Superior Court for the County of Tulare issued a temporary restraining order against the regulation in an action filed an hour earlier. *Pandol & Sons v. Mahony,* Tulare Superior Court No. 80521. That same day the Superior Court for the County of Fresno issued a peremptory writ of mandate ordering the Board to vacate the rule. *Kubo* v. *Mahony,* Fresno Superior Court No. 172286. The Fresno County action had been filed only two days before.[3]

[3] The state court actions were initiated after a three-judge federal district court for the Eastern District of California, acting in a suit filed by Pandol & Sons and Jasmine Vineyards, ruled that federal abstention was required, and declined to adjudicate any issues in the case. The three-judge panel also termi-

On September 15, 1975 the Board filed a petition for an original writ of prohibition and/or mandate in the California Supreme Court, seeking a determination of the regulation's validity and an immediate stay of the superior court decisions. On September 18, 1975, the California Supreme Court issued the requested stay, reinstating the access rule to full force and effect. Thereafter, the ALRB General Counsel has vigorously enforced the rule against employers who denied access, through superior court injunction actions (Cal. Labor Code § 1160.4) and unfair labor practice proceedings. Cal. Labor Code § 1160.2.

On March 4, 1976, after six months' deliberation and following extensive briefing, oral argument, and a review of the entire evidentiary record, the California Supreme Court upheld the rule against all of appellants' challenges under the United States Constitution and on various state law grounds, and issued a peremptory writ of mandate directing the lower courts to set aside their previous orders. *ALRB v. Superior Court,* 16 Cal.3d 392 (1976). On April 1,

nated a temporary restraining order entered September 3, 1975 by Judge M. D. Crocker, thereby vacating all the findings and the conclusion of unconstitutionality contained in the order. *Pandol & Sons* v. *Edmund G. Brown, Jr.*, No. F-75-165-CIV (E.D. Cal.)

On September 10, 1975, Pandol & Sons and Jasmine Vineyards applied to this Court for a stay of the three-judge abstention order and for continuance of the temporary restraining order. That application was denied on September 28, 1975 by Mr. Justice Douglas, acting as Circuit Justice for the Ninth Circuit. *Pandol & Sons v. Edmund G. Brown, Jr.*, No. A-222. On September 26, 1975, Pandol & Sons and Jasmine Vineyards filed a notice of appeal to this Court from the abstention order but have since abandoned that appeal.

1976 the California high court denied appellants' request for a stay of its judgment.

On April 5, 1976, without requesting opposition from the Board, Mr. Justice Rehnquist, acting as Circuit Justice for the Ninth Circuit, denied stay applications presented by both sets of appellants.[4]

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BECAUSE THE ACCESS RULE IS CONSTITUTIONAL.

A. The Access Rule Is a Valid Regulation of Property Under the Police Power.

As the California Supreme Court recognized, the access rule is part of a long tradition of state regulation of private property and business enterprise for the public welfare under the police power. *ALRB v. Superior Court,* 16 Cal.3d at 402–411. Such police power regulation has been repeatedly upheld by this Court against claims of unconstitutionality, even where the challenged provision sharply restricted the use or value of a landowner's property or interfered with an employer's freedom to contract with his employees. The only constitutional limitation is that a law must not be "unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York,* 291 U.S. 502, 525 (1934). The access rule is well within that constitutional boundary.

In the realm of the regulation of real property, the Court has upheld the constitutionality of zoning

[4] *Kubo v. ALRB,* No. A-868; *Pandol & Sons v. ALRB,* No. A-871.

and other land control provisions which were far more intrusive than the regulation challenged herein. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), this Court sustained the validity of a zoning ordinance which, by prohibiting the plaintiff from using its property for industrial purposes, reduced the land's value from $10,000 to $2,500 per acre. In *Berman v. Parker,* 348 U.S. 26 (1954), an area-wide redevelopment project was held constitutional even though it resulted in the razing of buildings which were not slums and utilized private developers, rather than a governmental agency, in carrying out the plan. Rent control legislation, which may reduce the value of land by restricting maximum rents, has also been sustained. *Bowles v. Willingham,* 321 U.S. 503 (1944); *Block v. Hirsh,* 256 U.S. 135, 155 (1921). Most recently, in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), this Court upheld a local ordinance which limited a property owner's right to use his property to house more than two unrelated persons.

Village of Belle Terre should also lay to rest appellants' claim that the "reasonable relationship" test is inapplicable because an employer's property rights are allegedly "fundamental personal liberties," requiring more intensive judicial scrutiny. In *Village of Belle Terre,* the Court made clear that property rights are not fundamental:

> "[The ordinance] involves no 'fundamental' right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any rights of privacy. We deal with economic and social legislation where legislatures have historically drawn lines which we respect . . . if the law be ' "reasonable not arbitrary" ' . . . and bears 'a rational relationship to a [permissible] state objective.' " (Citations omitted.)

If a homeowner's right to use his dwelling as he wishes is not fundamental, surely an employer's property interests occupy no higher status.

The fact that the access rule was promulgated as part of a comprehensive state labor relations statute further strengthens its constitutionality. This Court has often emphasized a state's broad police power authority to regulate employment and labor matters to protect workers. A few months ago, in *DeCanas v. Bica,* 96 S.Ct. 933 (1976), the Court unanimously upheld a California statute which prohibited employers from knowingly hiring illegal aliens, characterizing the provision as "within the mainstream of such police power regulation." 96 S.Ct. at 937. *See also West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) (minimum wage law); *Bunting v. Oregon,* 243 U.S. 426 (1917) (maximum hours law); *New York Central R.R. v. White,* 243 U.S. 188 (1917) (workmen's compensation law). *See Generally, NLRB v. Stowe Spinning Co.,* 336 U.S. 226, 232 (1949).

The ALRA is intended to benefit all the people of California by promoting the peaceful resolution of farm labor disputes. ALRA Preamble, Stats. 1975,

Third Ex. Sess., Chap. 1, § 1. The access rule was adopted by the Board as necessary to implement the organizational rights which lie at the crux of the Act, and serves a similarly public function.[5] The regulation is not as intrusive as the provisions upheld in the cases cited. The right of entry which it grants is available only a few hours a day, only during an organizational campaign, and only to a limited number of organizers. See Part C2, *infra*. It does not affect the use or value of appellants' property, nor interfere with relations with their employees.

As the California Supreme Court correctly held, the access regulation is merely "a limited economic regulation of the use of real property imposed for the public welfare." ***ALRB v. Superior Court,*** 16 Cal.3d at 409. Since it is not "unreasonable, arbitrary or capricious," (***Nebbia v. New York, supra,*** 291 U.S. at 525), the rule does not violate due process.

[5] Appellant Pandol's claim that the rule improperly benefits private individuals—farm labor organizers—rather than the public is frivolous. As this Court recognized in *Babcock & Wilcox*, the intended beneficiaries of access by union organizers are the employees, who are provided with information necessary to cast an informed ballot. Such communication clearly fulfills a significant public purpose. *NLRB v. Babcock & Wilcox, supra,* 351 U.S. at 112–113. *See also Berman v. Parker, supra,* 348 U.S. at 33–34.

Camara v. *Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967), also alleged to demonstrate the invalidity of the access rule, are inapposite. Those cases held that under the Fourth Amendment, warrants are required for searches of the interior of residential and commercial buildings. However, the Fourth Amendment does not apply to open fields. *Hester v. United States,* 265 U.S. 57, 59 (1924), reaffirmed in *Air Pollution Variance Bd. v. Western Alfalfa,* 416 U.S. 861 (1974).

B. The Access Rule Is Constitutional Even Though It May Permit Access on the Property of Some Employers Whose Workers May Be Reached by Traditional Means of Communication.

The fact that there may be a small number of ranches at which access is not necessary to communicate with employees[6] does not mean that the Board's

[6] The ALRB and the California Supreme Court recognized that at a small percentage of California ranches, employees might be accessible by traditional means of communication. 8 Cal. Admin. Code § 20900, subd. 3; *ALRB v. Superior Court,* 16 Cal.3d at 410. Appellants' claims that alternate methods of communication are generally available or exist at their particular farms are either unsupported or flatly contradicted by the findings of the Board, the California Supreme Court, and the lower state courts.

In the *Pandol* action, the Tulare Superior Court made no finding whatsoever on this issue. In *Kubo,* the Fresno Superior Court specifically *deleted* proposed finding of fact number VII, which stated:

> "The evidence presented at the hearing establishes that labor organizations seeking to organize and represent Plaintiffs/Petitioners' agricultural employees have available numerous reasonable and effective, alternative means of contacting and communicating with Plaintiffs/Petitioners' agricultural employees outside Plaintiffs/Petitioners' private fields and orchards. There is no evidence in the record to show that labor organizations have attempted to use and been unable to use such alternative means of communication with Plaintiffs/Petitioners' agricultural employees."

(Note absence of paragraph VII from the Fresno County order, Appendix D of Kubo Jurisdictional Statement.)

In the federal *Pandol* matter, which is not part of this appeal, Judge Crocker's "finding" that other means of communication were available at the two plaintiffs' ranches was contained in an order prepared by counsel, and signed after a brief oral argument in chambers. The ALRB had no opportunity to submit evidence or briefs before the order was issued. No hearing on a preliminary injunction was ever held because the full three-judge panel ruled that it would "abstain from adjudicating all issues in this case" until after action by the state courts. Appendix F, Pandol Jurisdictional Statement. In conformance with its decision to abstain, the court terminated the restraining order, thereby vacating the findings and conclusions contained in the order. See fn. 3, *supra.*

decision to proceed by regulation, rather than by ranch-by-ranch adjudication, is unconstitutional. This Court has recognized that the choice between a general rule and ad hoc adjudication "lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery,* 332 U.S. 194, 203 (1947). In making that decision, the agency may consider the cost, delay, and uncertainty inherent in individualized determinations. *Weinberger v. Salfi,* 422 U.S. 749, 777, 784–785 (1975). *See generally Mathews v. Eldridge,* 96 S.Ct. 893, 909 (1976). An exact fit between a rule's coverage and its purpose is not constitutionally required. *Mathews v. Diaz,* 44 U.S.L.W. 4748, 4753 (U.S. June 1, 1976).

In *Weinberger v. Salfi,* the Court upheld certain duration-of-relationship Social Security eligibility requirements, established to prevent fraud, although the provisions disqualified some beneficiaries who were guilty of no sham. The Court noted:

> "While such a limitation doubtless proves in particular cases to be 'under-inclusive' or 'over-inclusive,' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms. . . . [The Government] may rely on such rules so long as they comport with the standards of legislative reasonableness enunciated in cases like *Dandridge v. Williams* and *Richardson v. Belcher.*
>
> "Under those standards, the question raised is not whether a statutory provision precisely filters

> out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions. . . . Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." 422 U.S. at 776–777.

These principles were applied to administrative rulemaking in *Mourning v. Family Publication Service, Inc.,* 411 U.S. 356 (1973). There the Court sustained a regulation, promulgated under the Truth-in-Lending Act, requiring disclosure of certain contract information in credit transactions involving more than four installments. Although the purpose of the regulation was to promote disclosure of finance charges, the rule applied in some cases where there was no such charge. Emphasizing the deference owed to administrative expertise in fashioning remedies and the broad rulemaking authority vested in administrative agencies, the Court sustained the regulation, declaring:

> "[A] requirement that a line be drawn which insures that not one blameless individual will be

> subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. . . . [T]his rationale applies to administrative agencies as well as to legislatures. . . ." 411 U.S. at 374.

See also California v. LaRue, 409 U.S. 109 (1972), where a California regulation restricting sexual entertainment in bars and nightclubs was sustained against a First Amendment claim of overbreadth. The Court stressed an agency's "wide latitude as to choice of means to accomplish a permissible end," and commented, "The Department's choice of a prophylactic solution instead of one that would have required its own personnel to judge individual instances of inebriation cannot . . . be deemed an unreasonable one. . . ." 409 U.S. at 116.[7]

Significantly, in both *Salfi* and *Mourning*, the Court rejected contentions that the challenged provisions were invalid as irrebuttable presumptions. *Weinberger v. Salfi, supra,* 422 U.S. at 767–774; *Mourning v. Family Publication Service, Inc., supra,* 411 U.S. at

[7] The Court has frequently applied these principles to economic regulations restricting real property rights. *See Village of Euclid* v. *Ambler Realty Co., supra,* 272 U.S. 365, 388 ("inclusion of a reasonable margin to insure effective enforcement" of a zoning ordinance upheld despite claim that plaintiff's land was unreasonably affected); *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. 1, 8 (ordinance permitting two, but not more, unrelated persons to occupy a house sustained since "every line drawn by a legislature leaves some out that might well have been included"); *Berman* v. *Parker, supra,* 348 U.S. 26 (redevelopment on an area, rather than structure-by-structure, basis approved although some non-slum buildings might be demolished).

377. A similar argument by appellant Pandol must also fail. The access rule does not presume that alternative methods of communication with agricultural employees are lacking at all ranches. It functions as a prophylactic measure, requiring access at all employers' premises because of the Board's finding that it will be needed at most. *See Mourning, id.*

The factors outlined in the above cases were precisely the ones considered by the ALRB in determining to proceed by regulation, rather than by individualized determination. The Board realized that a case-by-case approach to access would be enormously expensive[8] and time-consuming, requiring the Board to expend a large proportion of its limited budget in a vast number of individualized proceedings, most of which would result in an order requiring access. In the meantime, the Board concluded, employees' organizational and electoral rights would be lost as the fleeting harvest season passed, and conflict and blood-

[8] While the Board members did not know the precise cost of a case-by-case approach when they adopted the rule, they were aware that it was well beyond the bounds of the ALRB budget. Subsequently, detailed calculations were prepared. *See ALRB, Report on S.B. 1441 before the Calif. Senate Finance Comm., Financial Impact of Determination of Access on a Case-by-Case Basis* (March 29, 1976), Appendix A-1. That report estimates that it would cost $2.5 million to comply with a proposed amendment to the Act requiring individualized access hearings. The bill did not pass. An earlier declaration by the ALRB Chief of Administration, submitted to the California Supreme Court, calculated the cost at $1 million if the individual access hearings lasted only one day. Appendix A-2. The $2.5 million figure, based on access hearings lasting an average of two days, represents a more realistic estimate. The Court is requested to take judicial notice of these reports. *Carolene Products* v. *United States,* 323 U.S. 18, 28 (1944).

shed would continue in the fields. In this unique and limited factual setting, the Board's choice of a prophylactic rule over ranch-by-ranch adjudication was entirely reasonable.

C. The Access Rule Is Consistent with the Principles of Babcock & Wilcox, Central Hardware, and Hudgens.

1. The Regulation Reflects a Proper Balance Between Organizational and Property Rights.

The access rule does not conflict with this Court's decisions in *NLRB v. Babcock & Wilcox Co., supra,* 351 U.S. 105; *Central Hardware Co. v. NLRB, supra,* 407 U.S. 539; and *Hudgens v. NLRB, supra,* 96 S. Ct. 1029 (1976). Those cases held that under the National Labor Relations Act, union organizers must be given access to an employer's premises for organizational purposes when employees cannot be reached through alternative means of communication.

As a threshold matter, the cases are irrelevant to any determination of the validity of the ALRB regulation for one simple reason: the decisions do not set forth constitutional principles, but simply interpret sections 7 and 8(a)(1) of the NLRA. 29 U.S.C. §§ 157, 158(a)(1). Strikingly absent from the opinions is any reference to the Constitution or the Due Process Clause as the source of limitations on the right of access. Rather, the Court in *Hudgens* characterized the balancing test of *Babcock & Wilcox* as establishing a "statutory standard" (96 S. Ct. 1033) involving "statutory criteria," (*id.* at 1032), and concluded that "the rights and liabilities of the parties in this case are dependent exclusively upon

the National Labor Relations Act." *Id.* at 1037. The Court remanded the case to the NLRB to be "considered under the statutory criteria of the National Labor Relations Act alone." *Id.* at 1038. Clearly, such a federal statutory interpretation does not bind a California administrative agency in implementing its own state statute.

Assuming, *arguendo,* that *Babcock & Wilcox* and its progeny state a *constitutional* doctrine, the ALRB rule complies with their holdings. Those decisions do not require that access be determined on a case-by-case basis. The issue was not even presented in *Babcock & Wilcox* and *Central Hardware,* and the opinions are accordingly silent on the matter. *ALRB v. Superior Court,* 16 Cal.3d at 414. However, in *Hudgens,* decided the day before the California Supreme Court ruling in this case, this Court strongly implied that in appropriate circumstances, a labor board might formulate a rule of access applicable to a whole class of employers. "In *each generic situation,*" the Court wrote, "the primary responsibility for making this [access] accommodation rests with the Board in the first instance." 96 S. Ct. at 1038. (Emphasis added.)

Appellants' claim that each employer must be treated separately ignores this portion of *Hudgens,* and would place these three federal labor cases at sharp odds with the general principles, discussed *supra* Part B, that an administrative agency may use its informed discretion to choose between a general

rule and ad hoc adjudication, and that a police power regulation is not unconstitutional simply because it may apply in some cases where it is not strictly necessary.

In the final analysis, the sole command of *Babcock & Wilcox* and its offspring—assuming that the cases state a constitutional requirement—is that the process of determining access must involve an accommodation between organizational and property rights "with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The decisions do not dictate a particular procedure for achieving that balance and make clear that the major responsibility for reaching the accommodation and adjusting it to the realities of the work place, lies with the labor relations agency, not the courts. *Hudgens v. NLRB, supra,* 96 S. Ct. at 1038; *NLRB v. Babcock & Wilcox, supra,* 351 U.S. at 112.

The ALRB fully complied with the mandate of accommodation when it promulgated the access rule. The Board considered the extensive evidence that California farmworkers are mobile, illiterate and speak foreign languages, rendering them largely inaccessible to off-the-job contact, and took into account the ALRA's seven-day election and peak-season provisions, which make swift communication between organizers and workers essential. Additionally, the Board was aware that the slow process of adjudicating thou-

sands of individual unfair labor practice charges involving access, when coupled with the Act's peak-season election provisions, would deprive most California agricultural employees of an opportunity to vote in a union election for several years. Finally and crucially, the ALRB knew that with its limited budget, it simply could not afford to conduct large numbers of individualized hearings. To have opted for case-by-case adjudication of access would have meant, not the balancing of conflicting positions, but rather the wholesale destruction of the organizational rights of the state's farmworkers.[9]

Thus, the Board concluded that accommodation, in the context of California agriculture and the ALRA, demanded the adoption of a limited and specific access rule. What the outcome might be in a different state, a different industry, or under a different statute is wholly speculative and is irrelevant to this appeal. The sole question confronting the Court is whether on *these* facts and under *this* statute, the ALRB's determination was reasonable. *See California v. LaRue,*

[9] The fact that the *ALRB* balanced the conflicting interests makes irrelevant appellants' argument that the *California Supreme Court* erred when it applied a "rational relationship," rather than a balancing, test in its constitutional analysis. Additionally, the California high court *did* measure the regulation against the *Babcock & Wilcox* criteria. It simply did so during its discussion of whether the rule was consistent with NLRB precedents, as required by section 1148 of the Act. Cal. Labor Code § 1148. *ALRB* v. *Superior Court,* 16 Cal.3d at 412–416. The Court's reasoning and conclusion are fully applicable here.

supra, 409 U.S. at 116. For all the reasons stated, the answer must be yes.[10]

[10] The existence of labor relations statutes in other states is no basis to note probable jurisdiction in this case. None of the four states with special farm labor laws—Arizona, Kansas, Idaho, and Oregon—has promulgated an access rule and none is likely to do so for several reasons.

First, the statutory schemes of the Arizona, Kansas, and Idaho statutes are significantly different from the ALRA. None of the three sets any time limit on how quickly an election must be held; none provides that the election be conducted during peak season; all require a time-consuming pre-election unit hearing. Ariz. Rev. Stats. § 23-1381, et seq.; Kansas Stats. Ann. § 44-818, et seq.; Idaho Code § 22-4101, et seq. Thus, the ALRA's strict time constraints, an important factor in the promulgation of the access rule, are missing in these other states.

Additionally, the Idaho and Kansas statutes are simply not in use. We are informed by the Idaho Attorney General's Office that no election has ever been held under its statute. According to the Kansas Attorney General's Office, the Kansas Agricultural Labor Relations Board conducted one election, which was never certified, and the Board has not met since 1974. The General Counsel of the Arizona Agricultural Employment Relations Board has informed us that there have been only five elections under the Arizona statute since its passage in 1972.

The Oregon farm labor statute establishes no labor relations board and makes no provision for holding elections. It simply limits harvest-time picketing. Ore. Rev. Stats. § 662.805 et seq. Contrary to the claim of appellant Kubo, Michigan has no farm labor statute whatsoever. In fact, both Michigan and Oregon have comprehensive labor relations statutes which specifically exclude agricultural employees. Mich. Stats. Ann. § 17.454(2)(e); Ore. Rev. Stats. § 663.005(3)(a). The farm labor bills introduced in the legislatures of Texas, New Mexico, Utah, Hawaii, Washington, and Florida have all died.

The labor relations statutes of Hawaii, New Jersey, Wisconsin and Puerto Rico do not exclude agricultural workers, but contain no expedited procedure geared to agricultural elections. Haw. Rev. Stats. § 377-1 et seq.; Rev. Stats. of N.J. § 34:13A-1 et seq.; Wisc. Stats. Ann. § 111.01, et seq.; Laws of Puerto Rico, Title 29, § 62, et seq. Consequently, the time pressures requiring an access rule are absent.

The general organizing statutes in other states are simply broad declarations of the rights of employees to organize, but establish no labor relations agency or electoral machinery. Ark. Stats. Ann. § 41-4124; Colo. Rev. Stats. § 8-2-101, et seq.; Ind. Ann. Stats. § 35-15-3-1; La. Rev. Stats. § 23.822; Mo. Const. Art. I, § 29; Nev. Rev. Stats. § 614.090, et seq.; N.Y. Const. Art. I, § 17; N.D. Rev. Code § 34-19-01; Pa. Stats. Ann., Title 43, § 191; Tex. Stats. Ann. Art. 5207a; Utah Code Ann., § 34-2-1; Rev. Code of Wash. § 49.36.010, et seq. Indeed, several of these states also have comprehensive labor relations statutes which exclude farmworkers from their coverage. Colo. Rev. Stats. § 80-4-2(3)(a); N.Y. Labor Law § 701(3); N.D. Rev. Code § 34-12-01(3); Pa. Stats. Ann., Title 43, § 211.3(d); Utah Code Ann. § 34-20-2(3).

2. The Extent of Access Permitted by the Rule Comports With the Guidelines Set Forth in Central Hardware.

The scope and duration of access granted by the ALRB regulation are consistent with the general guidelines set forth in *Central Hardware.* There, continuing its balancing theme, the Court declared:

> "(T)he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organizational activity." 407 U.S. at 545.

The ALRB access rule, which permits non-disruptive entry by two organizers per work crew for 60 minutes before and after work and 60 minutes during employees' lunch period, complies with the spirit of *Central Hardware,* as applied to the California agricultural setting. *ALRB v. Superior Court,* 16 Cal.3d at 417.

First, access is clearly limited to union organizers. The rule expressly so provides and even prescribes

the number of organizers permitted to enter. The regulation further requires organizers to wear a badge or other designation of affiliation and, upon request, to identify themselves by name and labor organization to the employer or his agent. Both the numbers restriction and the identification requirement are more stringent than the standards of *Central Hardware*.

The second *Central Hardware* guideline—that access be limited to nonworking areas—cannot be literally met because, as the Board and the State Supreme Court found, California ranches generally have no nonworking areas, such as the parking lots and lunchrooms available in industrial settings. *ALRB v. Superior Court*, 16 Cal.3d at 417. However, the purpose of this provision—to prevent disruption of production (*id.*)—is satisfied in the only way possible in the agricultural context, by limiting access to nonworking periods, and restricting organizers to the locations at which the employees congregate or eat lunch.[11] Further the rule expressly prohibits any disruption of "the employer's property or agricultural operations, including injury to crops or machinery" 8 Cal. Admin. Code § 20900, subd. 5(e), and permits expulsion of any organizers who engage in disruptive conduct.

[11] If there is no established lunch break, the ALRB regulation permits a one-hour access period "at any time during the working day," 8 Cal. Admin. Code § 20900, subd. 5(b), to cover piece-rate workers, who lack a fixed lunch period and are permitted to select their own breaks. The rule thus allows piece-rate workers to utilize their non-working periods to talk to organizers who have entered the premises.

Finally, access is limited in duration because it ceases after election results have been certified. 8 Cal. Admin. Code § 20900, subd. 5(f). The Act requires the Board to promptly certify an election unless objections are filed within five days. Cal. Labor Code § 1156.3(d).

CONCLUSION

California is engaged in a novel experiment. Agricultural workers have historically been excluded from coverage under the National Labor Relations Act because Congress recognized that their employment situation was so different from that of industrial workers that it would be awkward, if not impossible, to treat them under a single statutory scheme. California is the nation's largest agricultural producer, and agriculture is California's largest industry. So it is altogether fitting that California would make the first comprehensive attempt to define the rights and obligations of agricultural employers and employees by means of a state farm labor statute with a full-time regulatory agency. Faced with a unique factual situation, the California Legislature and the California Agricultural Labor Relations Board have developed a unique legal response—an access rule that effectuates farmworkers' newly created organizational rights in a manner tailored to the particulars of California agriculture.

Federalism requires that California be free to experiment with new solutions to sensitive social and economic problems without unnecessary interference by the federal judiciary. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164–167 (1973), and cases cited therein. The benefits that can flow from a federal system which provides room for social experimentation by the states were perhaps best extolled by Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (1932), at the close of the heyday of the now discredited substantive due process doctrine:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

California has long been searching for a just solution to the conflict that has plagued its fields and orchards. The ALRA and the access rule which implements it are the fruits of that search. The Court should decline to note probable jurisdiction of these appeals both because the access regulation is constitutional, as has been demonstrated, and because the

rule is so specifically directed to a local problem that a decision would be too narrow to have national application.

Dated: June 25, 1976

Respectfully submitted,

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AGRICULTURAL LABOR
RELATIONS BOARD

(Appendices Follow)

APPENDIX A-1

March 29, 1976

REPORT OF THE AGRICULTURAL LABOR RELATIONS BOARD ON SENATE BILL 1441 BEFORE THE CALIFORNIA SENATE FINANCE COMMITTEE—FINANCIAL IMPACT OF DETERMINATION OF ACCESS ON A CASE-BY-CASE BASIS

Section 14 of Senate Bill 1441 would amend Labor Code Section 1153(a) to provide that: "[I]n accordance with and subject to National Labor Relations Act precedent, it shall not be an unfair labor practice, nor grounds for objecting to conduct affecting the results of an election, for an agricultural employer to deny nonemployee labor organization organizers or representatives the right of access to its premises. In such cases, the burden of proof to establish there are no reasonable alternative means of communicating with employees shall be on the party seeking to gain access." The effect of this provision, should it become law, would be to require the Agricultural Labor Relations Board to determine access on a case-by-case basis rather than by the present regulation, which grants a limited right of access at the premises of all agricultural employers. In order to provide the Senate Finance Committee with full information regarding the financial impact of this proposed amendment, the Agricultural Labor Relations Board and its General Counsel, with the aid of the Board's Chief of Administration, have prepared the following analysis of the operational costs of such a case-by-case determination of access.

(1) The proposed amendment would require the Board to adopt the NLRA procedure for determining

access. The NLRB decides whether union organizers have a right of access to a particular employer's property in the context of an unfair labor practice proceeding which is initiated by the filing of a charge by a union that contends it has wrongfully been denied access. The basic inquiry in such unfair labor practice proceedings under the NLRA is whether union organizers have reasonable alternative means to communicate with the employer's workers. This is essentially a factual question which requires detailed investigation into such issues as: the stability of the work force, including the percentage of workers who live in the community throughout the year, the percentage of workers who work year-around for this employer, how long workers who work less than the full year are employed, whether workers are provided through a labor contractor, the percentage of employees who live on and off the employer's property, the location of the homes of those who live off the property, the means by which those employees reach work, the physical layout of the employer's property (e.g., whether employees park their cars within or outside of the employer's property), whether employees spend their entire day on the employer's property or whether they are outside the borders of the property during breaks, whether they customarily congregate at a place outside the borders of the property prior to commencing or after completing work, and numerous other questions. These issues would also be the crux of a case-by-case determination of access under the ALRA.

(2) The financial analysis set forth herein is based on the costs which the ALRB has found to be entailed in the investigation and trial of other unfair labor

practice cases under the ALRA. Although the General Counsel has prosecuted some cases involving denial of access under the present regulation, these cases have been far simpler factually and legally than the NLRA approach because the question of alternative means of communication is not presented in those cases. Additionally, as will be set forth, the number of incidents of denial of access under the present regulation has been far fewer than is anticipated under the case-by-case approach. For all these reasons, the costs of determining denial of access cases will be greatly multiplied.

(3) Denial of access generally occurs in relation to attempts by one or more unions to obtain authorization cards necessary to file an election petition and in attempts to campaign once an election has been scheduled. Based upon the Board's experience during the period of August 1975 to January 1976, we anticipate that approximately 1250 election petitions will be filed during the 1976–1977 fiscal year. Based also on experience to date, the General Counsel estimates that absent the present general regulation requiring access at all ranches, unfair labor practice charges alleging a wrongful denial of access to union organizers will be filed in approximately 75% of those cases in which a union seeks to organize the employees of an agricultural employer and petitions for an election. Since we expect 1250 elections petitions during the fiscal year beginning July of 1976, the General Counsel anticipates that unfair labor practice charges alleging a wrongful denial of access will be filed in approximately 938 cases. While such wrongful denial of access allegations may lessen in future years, the history

of the relationship between California growers and farm labor unions over the last decade and the opposition which the Board's current access rule has evoked among employers suggest that a 75 percent incidence of wrongful denial of access is likely during the next year.

(4) When a union files an unfair labor practice charge alleging wrongful denial of access, significant costs are generated by three processes: (1) investigation of the charge by an investigator from the General Counsel's office, (2) the obtaining of a Superior Court injunction if the General Counsel finds the charge meritorious and issues a complaint, and (3) the trial of the case before an Administrative Law Officer by an attorney from the General Counsel's office. The costs of each of these three processes are analyzed separately.

The General Counsel estimates that investigation of unfair labor practice charges involving access would take between one and four days per case, including a personal visit to the employer's property by the investigator. Assuming that the average time for investigation of each case is two days, we estimate that investigation costs per case, including the investigator's salary, travel and per diem costs, would be $200.

(5) Section 1160.4 of the Labor Code gives the General Counsel power to seek injunctive relief against the continued commission of unfair labor practices. It has been the General Counsel's practice to seek injunctive relief in nearly all cases of denial of access under the present regulation where such denial will interfere with a labor organization's ability to organize employees or effectively campaign

prior to an election. Since the General Counsel anticipates a great increase in the incidents of wrongful denial of access if the Board were forced to use a case-by-case approach, the number of instances in which General Counsel would seek injunctive relief would correspondingly increase. At minimum, each suit would involve costs of an attorney's salary for one day of preparation and one day of hearing, necessary travel and per diem costs, and secretarial support in preparing the necessary legal papers. The estimated cost of each injunction suit is at least $300.

(6) The trial of an unfair labor practice case must, by statute, be a formal hearing with a transcribed record. Consequentl each unfair labor practice hearing on access would require the Board to pay for the services of an Administrative Hearing Officer, rental of a hearing room, costs of a court reporter and preparation of a transcript, travel expenses and per diem allowance for the hearing officer, costs of an interpreter, and salary for one attorney for pre-trial preparation and trial of the case. Because of the detailed evidence which would be involved in access cases, each such access hearing would probably be of substantial length, perhaps 1–2 days in the simpler cases and five or more days in the complex cases. In addition, the initial trials on access, which would establish legal precedent which may make settlement of later cases possible, would no doubt be exhaustively tried by all parties and therefore might last up to 10 days per case.

Our experience has been that each day of unfair labor practice hearing costs the Board at least $1050, broken down as follows:

Salary of Hearing Officer	$ 150
Salary of General Counsel staff attorney to try case	100
Cost of court reporter and transcript	550
Salary of Interpreter	50
Daily travel expense and per diem allowance for hearing officer	50
Daily travel expenses, per diem allowance, and other overhead for staff attorney, and other staff	50
Salary of hearing officer for post-hearing report-writing—4 hours for each day of hearing	75
Rental of hearing room	25
Total	$1050

To those costs must be added certain pre-hearing and other one-time costs, as follows:

Four hours' pre-hearing salary for hearing officer, including travel time and preparation	75
Salary of General Counsel staff attorney for two days pre-hearing preparation, plus associated per diem, travel, and other overhead costs	250
Administrative overhead costs, including supervising the hearing officer and salary of calendar clerk	25
Total	$ 350

Even if we take a conservative estimate that during the 1976–1977 fiscal year, the average hearing time for access cases would be only two days, we calculate that the total hearing costs of each access case hearing

would be $2450.

(7) Thus the cost of investigation and hearing in each access case would be approximately $2650. If injunctive relief was sought in most cases, as expected, that would add an additional $300 per case. The 938 access cases anticipated in fiscal year 1976–1977 would add increased expenses of $2,485,700 to the Board's operational costs. Needless to say, these costs are not now included in the Board's proposed $6.7 million budget.

APPENDIX A-2

SUPREME COURT OF THE STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD, ET AL,
Petitioners,
v.
SUPERIOR COURT OF FRESNO COUNTY, SUPERIOR COURT OF TULARE COUNTY,
Respondents,
and
PANDOL AND SONS, ET AL.
Real Parties in Interest.

No. SF 23349
DECLARATION OF C. DAVID WILLIS

I, C. DAVID WILLIS, declare:

I am the Chief of Administration for the Agricultural Labor Relations Board (ALRB). In that capacity, I oversee all administrative functions of the agency including payroll, accounting, business services, management analysis, and budgeting. I have ultimate responsibility under the Board and the General Counsel for all financial aspects of the agency. I have held this position since November 3, 1975. Prior to that period, I served as Budget Officer for the State Department of Water Resources from 1971–1975, and was a Budget Analyst between 1965 and 1971 for the Department of Water Resources and the State Department of Education. In each of these prior jobs, I performed similar functions in relation to the financial functioning of the respective agencies.

Since I became Chief of Administration for the ALRB, I have reviewed and approved the payment of all expenditures relating to unfair labor practice hearings. Consequently, I am intimately familiar with all

aspects of the costs of such hearings. Based on that experience, I have found that on the average a one-day hearing on an unfair labor practice charge costs the Board at least $1,300. That cost is broken down as follows:

Pre-Hearing and Other One-Time Costs:	
Four hours' pre-hearing salary for hearing officer, including travel time and preparation	$ 75
Salary of General Counsel staff attorney for one day's pre-hearing preparation	100
Salary of ALRB investigator for one day's investigation	50
Administrative overhead costs, including supervising the hearing officer and salary of calendar clerk	25
Sub-total	$ 250
Daily Costs:	
Salary of Hearing Officer	150
Salary of General Counsel staff attorney to try case	100
Cost of court reporter and transcript	550
Salary of Interpreter	50
Daily travel expense and per diem allowance for hearing officer	50
Daily travel expenses, per diem allowance, and other overhead for staff attorney, and other staff	50
Salary of hearing officer for post-hearing report-writing—four hours for each day of hearing	75
Rental of hearing room	25
Sub-total	$1050
TOTAL	$1300

As indicated above under "Daily Costs," each additional day of hearing beyond the first day costs an additional $1050.

If the Board is required to determine access on a case-by-case approach, following the filing of an unfair labor practice charge by a union that had been denied access, each such hearing would thus cost a minimum of $1300, plus $1050 for each additional day of hearing after the first day.

Based on the ALRB's experience thus far, we have estimated that the Board will conduct 1250 elections during the 1976–77 budget year. (The Board conducted 409 elections during its first five months of operations.) In the absence of an access rule, the General Counsel estimates that denial of access is likely to be an issue in at least 75 percent—or 938—of these elections, requiring the holding of an unfair labor practice hearing in each such case. Based on our previous experience, the holding of one-day hearings in these cases would cost the Board an additional $984,900 in the 1976–77 budget year. Longer hearings, at an increased cost, would be probable in a large percentage of these matters.

The Board's $6.7 million proposed budget for the 1976–77 budget year is based on the assumption that the access rule will be upheld, and does not reflect the increased expenses described herein.

I declare under penalty of perjury that the foregoing is true and correct. Executed under penalty of perjury on March 2, 1976 in Sacramento, California.

C. DAVID WILLIS

o

Supreme Court, U. S.
FILED
SEP 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1734

HARRY KUBO, NISEI FARMERS LEAGUE AND WESTERN TOMATO GROWERS & SHIPPERS, INC.,
Appellants,

VS.

AGRICULTURAL LABOR RELATIONS BOARD OF THE STATE OF CALIFORNIA,
Appellee.

No. 75-1754

PANDOL & SONS, a California partnership; JASMINE VINEYARDS, INC., a California corporation,
Appellants,

VS.

AGRICULTURAL LABOR RELATIONS BOARD,
Appellee.

On Appeal from the Supreme Court of California

APPELLEE'S SUPPLEMENTAL BRIEF

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APPELLEE'S SUPPLEMENTAL BRIEF

This supplemental brief is filed pursuant to Supreme Court Rule 16(5) to call the Court's attention to several new cases, decided late last term, which were not available at the time of the preparation of the Motion to Dismiss.

City of New Orleans v. Dukes, 96 S.Ct. 2513 (1976), upheld the validity of a New Orleans ordinance whose "grandfather provision" excepted certain persons from an ordinance barring pushcart vendors from parts of the city. Reaffirming the "wide latitude" accorded to states in regulating their local economies under the police power and the deference paid by the judiciary to legislative policy determinations in this sphere, the Court found that the classification met the rational relationship standard which governs both equal protection and due process claims. This non-zoning decision is further support for the proposition, recognized by the California Supreme Court, that the access rule is part of a long tradition of state regulation of private property for the public welfare under the police power. Motion to Dismiss, 13-16.

In *Massachusetts Bd. of Retirement v. Murgia,* 96 S.Ct. 2562 (1976), the Court sustained a statute requiring state police officers to retire at age 50. While recognizing that some individuals over 50 could safely function as uniformed officers, the Court held that the state was not required to undertake individualized testing in order to determine which 50-year-old officers could still perform effectively. The Court stated:

> "Since physical ability *generally* declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the state's objective. There is no indication that [the statute] has the effect of excluding from service so few officers who are in fact unqualified as to

> render age 50 a criterion *wholly unrelated* to the objective of the statute." *Id.* at 2567-2568 (Emphasis added.)

Thus, a rule, rather than a case-by-case approach, was valid because the factual basis for the rule was "generally" true and not "wholly unrelated" to its objective. This holding is directly applicable to the instant case, where the ALRB adopted the access rule after concluding that "generally" unions seeking to organize agricultural employees do not have alternative channels of effective communication.[1] 8 Cal. Admin. Code §20900, subd. 3. Motion to Dismiss, 17-22.

See also, Mathews v. Lucas, 96 S.Ct. 2755, 2764 (1976), holding that the government might legitimately adopt rules in order to "avoid the burden and expense of specific case-by-case determination. . . ."

These cases illustrate this Court's continuing adherence to the legal principles supporting the validity of

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[1]The fact that unions were able to reach some farm workers before the access rule became operative on September 18, 1975 does not undercut the Board's finding that "generally" reasonable means of communication are unavailable. The vast majority of early ALRB elections took place in the Delano and Salinas areas, where agricultural unions had been organizing for over a decade. In addition, one union, the Teamsters, had access to many ranches in these areas through clauses in pre-existing contracts. Transcript of ALRB Access Hearing, Aug. 28, 1975, A-81:5-8. The rival United Farm Workers Union often utilized surreptitious access to reach workers, as evidenced by the numerous UFW organizers arrested for trespass during the months before the access regulation took effect. *Id.*, A-81:1-4.

By contrast, at most of the 78,000 farms in California, little or no labor organization has taken place.

the access regulation, and provide further reason for the Court to decline to note probable jurisdiction.

Dated: September 15, 1976.

Respectfully submitted,

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On Appeal from the Supreme Court of California

APPELLANTS' REPLY TO MOTION TO DISMISS

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1. This is not a zoning case. The access regulation is not a local ordinance adopted by a county or local municipal council (see *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 379, 393 (1926); *State ex rel. Civello v. New Orleans*, 164 La. 282, 283 (1923)) which classifies land use into various distinct categories within a given area. See, *e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Rather, it is a

statewide regulation, adopted by a non-elected administrative agency, which in its breadth substantially affects the fundamental property rights of each and every agricultural employer in the State of California.

This case involves the constitutionality of a regulation which allows an uninvited intrusion or trespass upon the private property of a landowner; it does not involve the constitutionality of "a land use project" (see *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 5), wherein "particular uses to be made [or values] of the land" (*Berman v. Parker,* 348 U.S. 26, 34 (1954)) are affirmatively regulated. Even Appellee recognized this crucial distinction when it stated: "[The access rule] does not affect the use or value of appellants' property. . . ." (Motion to Dismiss, p. 16). Accordingly, the constitutional analysis applied in zoning cases must be found inapplicable to and distinguishable from the issues involved in this case.[1] As noted by Justice Clarke in his dissenting opinion from the lower court's decision, "[T]he law of zoning is not a universal solvent in which property rights are dissolved." 16 Cal.3d at 430. Indeed, the absence of any mention of the law of zoning in *Babcock* or *Central Hardware* adds further support to the view that zoning cases are irrelevant to

[1]A case such as *Village of Belle Terre v. Boraas, supra,* is further distinguishable from the instant case in that the zoning ordinance involved therein was never challenged on Fifth and Fourteenth Amendment fundamental property right grounds. See 416 U.S. at 7. *Village of Belle Terre* thus never reached the issue of whether or not certain rights in property were fundamental; that issue, as discussed *infra,* was explicitly reached in various decisions relating to a landowner's right to exclude uninvited guests from his property.

the present inquiry and that the lower court's and Appellee's reliance on such cases is clearly misplaced.

2. Nor is this a case involving non-fundamental rights such as "non-contractual benefits under a social welfare program" (see *Weinberger v. Salfi,* 422 U.S. 749 (1975); *Fleming v. Nestor,* 363 U.S. 603, 611 (1960)). It is instead a case involving "important liberties cognizable under the Constitution" (see *Weinberger v. Salfi, supra,* 45 L.Ed.2d at 550), liberties which in the context of non-employee access or other uninvited intrusion have always been deemed "fundamental." See *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); *Central Hardware Company v. NLRB,* 407 U.S. 539 (1972); *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972).

To assert, as did the lower court and Appellee, that a landowner's right to protect his property from uninvited guests or trespassers is not a fundamental right is to ignore explicit language by this Court. See *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 567-568, 570; *Central Hardware Company v. NLRB, supra,* 407 U.S. at 547; *Lynch v. Household Finance Corp.,* 405 U.S. at 552:

> "We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these *fundamental rights* of a free society are incompatible with each other." *Lloyd Corp. v. Tanner, supra,* 407 U.S. at 570. (Emphasis added.)

In claiming that property rights are not fundamental, both the Appellee and the 4-3 majority of the lower court erroneously failed to distinguish between those *personal* rights in property that are fundamental, and those that are not. As this Court made clear in *Lynch v. Household Finance Corp., supra,* 405 U.S. at 522, the Due Process Clause affords protection against the unwarranted infringement of one's *personal* rights in property. And the personal right in property to protect it from uninvited guests or trespassers has *always* been viewed as a fundamental right and accordingly has only been required to yield upon a showing of necessity:

> "Although . . . the courts properly have shown a special solicitude for guarantees of the First Amendment, *this Court has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." Lloyd Corp. v. Tanner, supra,* 407 U.S. at 567-568. (Emphasis added.)

Accord: *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The recognition of the fundamental nature of this property right was surely the basis for the Court's conclusion in *Babcock* and *Central Hardware* that such Fifth and Fourteenth Amendment rights may yield "only to the extent needed." (351 U.S. at 112). Indeed, contrary to Appellee's assertion, *Babcock* and *Central Hardware* explicitly refer to the Constitution and the Due Process Clause as the basic limitations

against allowing uninvited guests and trespassers upon the property of a landowner. For example, in *Babcock* the Court noted, "organizational rights are granted to workers by the same authority, the National Government, that preserves property rights" (351 U.S. at 112); and in *Central Hardware* the Court stated, "[The Board's argument] would . . . constitute an unwarranted infringement of long-settled rights of property protected by the Fifth and Fourteenth Amendments." (407 U.S. at 547).

Because the personal rights in property involved herein are fundamental rights protected by the Fifth and Fourteenth Amendments' Due Process Clauses, Appellee's and the lower court's reliance on cases such as *Weinberger v. Salfi, supra,* and *Mourning v. Family Publication Service, Inc.,* 411 U.S. 356 (1973) is obviously misplaced.

3. Because this case involves the substantial impairment of well-established and important fundamental rights in property, Appellee's argument relating to its need for administrative ease and efficiency must be rejected.

Appellee contends that an enormously expensive and time-consuming administrative burden would result if the instant access regulation were held unconstitutional. In support of this contention, Appellee refers to two reports written by *Appellee itself* estimating the cost of individual access hearings and that such hearings would be required "in approximately 75% of those cases in which a union seeks to organize." (Motion to Dismiss, Appendix A-1, p. 35).

Such self-serving *estimates* of administrative burden add little to the c nstitutional inquiry at the heart of this case, and noreover, detract from the basic issue facing this Court, i.e., the deprivation of fundamental property rights, a deprivation which thus makes the issue of administrative burden irrelevant. (See, *e.g., Vlandis v. Kline,* 412 U.S. 441, 446 (1973); *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972)).

As previously noted in Appellants' Jurisdictional Statement (p. 13, n. 9), Appellants have not argued that any and all access regulations would necessarily be invalid and that the issue of access must be litigated in each case pursuant to the ALRA's unfair labor practice procedures. Rather, Appellants have pointed out that an access regulation can be devised which would meet all constitutional requirements as long as it sets forth understandable criteria and takes into account the constitutional standards and limitations of *Babcock* and its progeny. With the promulgation of such a regulation, most employers would necessarily be deterred from litigating access issues unless they were reasonably certain of success. As noted by Appellee (see Motion to Dismiss, p. 21), *assuming the Board followed appropriate constitutional standards,* many employers would ultimately be required to allow non-employee access to their farms,[2]

[2]This is not to say that other employers would not be required to yield their property rights to non-employee access. Appellee's assertion that Appellants' claims of alternative means of communication are "unsupported or flatly contradicted" (see Motion to Dismiss, p. 17, n. 6) is thus confusing and frivolous, inasmuch as both the California Supreme Court and Appellee have admitted that as a result of the instant access regulation, there will be a number of farms at which access is not necessary

a fact which strongly supports the view that many employers would not engage in unnecessary access litigation and which further suggests that Appellee's estimate of litigation in 75% of all cases is unrealistic and based on nothing other that unsubstantiated speculation.[3] In this connection, it is noteworthy that in the forty-year history of the NLRA, there have been less than one hundred cases litigated involving the issue of access even though the NLRB has adhered to a strict case by case approach.

However, even assuming an added administrative burden would result from a finding of unconstitution-

in order to communicate effectively with employees. (See, 16 Cal.3d at 410). As noted in Appellants' "Application For Stay Of The Judgment And Orders Of The Supreme Court Of The State Of California" (p. 6, n. 2), both the declarations of Appellant Harry Kubo and the verified Return submitted to the California Supreme Court were at no time contradicted by Appellee.

[3]Appellee's further argument that the seven-day election procedure and the short peak season requirements of the ALRA demand an overbroad regulation ignores the realities that even before the access regulation was in effect, unions representing agricultural employees had little or no difficulty obtaining sufficient signatures for election petitions or winning most elections. For example, according to the Appellee's Public Information Office, as of September 12, 1975, approximately one week prior to the California Supreme Court's stay of the lower courts' orders enjoining the access rule, 171 petitions for elections covering thousands of agricultural employers had been filed, and by November 13, 1975, election results were as follows: employees of 259 farms voted for either the UFW or Teamster Unions while employees of only 13 farms voted no-union. The Court is requested to take judicial notice of these facts. Moreover, as indicated by the authorities cited above, Appellee cannot rely on its own administrative procedures to justify an unconstitutional infringement of fundamental rights in property. Such a bootstrap argument has no place in the constitutional analysis required herein, especially when formal or informal administrative procedures can be devised by Appellee itself to allow for a pre-election and/or post-election access inquiry which could easily satisfy the time restrictions provided in the ALRA.

ality, the state's interest in administrative efficiency cannot be deemed a sufficient basis for depriving citizens of their fundamental rights. *Stanley v. Illinois, supra,* 405 U.S. at 656-657. This Court has forthrightly rejected similar state contentions in the past and should again reject such a contention in this case, a contention which impermissibly elevates the value of administrative speed and efficiency above the value of Appellants' fundamental rights as guaranteed by the Constitution. See *Cleveland Board of Ed. v. LaFleur,* 414 U.S. 632, 644, 649 (1974); *Vlandis v. Kline, supra,* 412 U.S. at 446; *Stanley v. Illinois, supra,* 405 U.S. at 656-657. As this Court stated in *Stanley v. Illinois:*

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [Footnote omitted] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determinations . . ." 405 U.S. at 656, 657.

CONCLUSION

For the reasons stated herein, as well as for the reasons stated in its Jurisdictional Statement, Appellants respectfully submit that the decision below should be summarily reversed, and that if this Court is not disposed to reverse summarily, it is respectfully urged, in light of the substantial federal questions involved, that probable jurisdiction be noted.

Dated, September 1, 1976.

Respectfully submitted,

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